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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

RONALD L. COSBY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether in a railroad merger the employees of a motor carrier subsidiary are "railroad employees" entitled to mandatory labor protective conditions?

2. Whether the court of appeals exceeded its jurisdiction in determining causation issues subject to a mandatory arbitration requirement?

3. Whether the court of appeals, in reversing the Interstate Commerce Commission's refusal to reopen the proceeding, erred in directing the Commission to grant particular relief?

PARTIES TO THE PROCEEDINGS BELOW AND SUPREME COURT RULE 28.1 STATEMENT

In addition to the parties named in the caption, 111 individuals appeared before the Interstate Commerce Commission and the Eighth Circuit Court of Appeals as petitioners; * the Interstate Commerce Commission and the United States of America appeared before the Eighth Circuit Court of Appeals as respondents.

Petitioner's parent company is Burlington Northern Inc. The partially owned subsidiaries and affiliates of petitioner and petitioner's parent are:

Burlington Northern Railroad Company:

The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Davenport, Rock Island and
North Western Railway Company
The Denver Union Terminal Railway Company
Galveston Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal and
Transfer Railway Company
Longview Switching Company
The Minnesota Transfer Railroad Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
The Pueblo Union Depot and Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company

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* The 111 individuals are listed in the Appendix at 47a.

The El Paso Company:

- El Paso Development Co.:
  - Lake Country
  - Windjammer, Inc.:
    - Adams Canyon Ranch
    - Santa Paula Farms
- El Paso Natural Gas Co.:
  - El Paso Europe-Afrique, S.A.
  - El Paso Hydrocarbons Co.:
    - Minera San Pedro Corralitos, S.A.
- Milestone Petroleum Inc.:
  - Butte Pipe Line Company
  - Portal Pipe Line Company
- New Mexico and Arizona Land Company:
  - NZ Development Corp.
  - NZ Properties, Inc.

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v.

RONALD L. COSBY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Burlington Northern Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 22, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 741 F.2d 1077 (8th Cir. 1984), and appears in the Appendix at 1a to 14a. The opinion of the Interstate Commerce Commission, which has not been reported, appears in the Appendix at 15a to 21a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 22, 1984. A timely peti-

tion for rehearing and suggestion for rehearing *en banc* was denied on October 18, 1984. A request for extension of the time allowed for the filing of this petition was filed on December 17, 1984. On December 20, 1984, the deadline for filing of this petition was extended to February 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f) (1976), is set forth in the Appendix at 26a. That section has been recodified at 49 U.S.C. § 11347 (1982). Section 11347 is set forth in the Appendix at 28a. Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(c) (1976), is set forth in the Appendix at 26a. That section has been recodified, in pertinent part, at 49 U.S.C. § 11344(b)(2)-(c) (1982). Section 11344(b)(2)-(c) is set forth in the Appendix at 27a to 28a.

STATEMENT OF THE CASE

Since enactment of the Transportation Act of 1940 the Interstate Commerce Commission has been required, in approving a railroad merger, to impose conditions for the protection of the railroad employees affected by the merger.[1] The level of benefits afforded by the protective conditions evolved through a series of ICC decisions,[2] and culminated in 1976 with a congressional directive that

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[1] The concept of employee protective conditions had originated in 1936 in the Washington Job Protection Agreement, a voluntary arrangement between the major railroads and the principal railroad labor unions designed to facilitate railroad mergers without excessive labor strife. *See Railway Labor Association v. United States*, 339 U.S. 142, 146-48 (1950).

[2] The history of the development of employee protective conditions is described in detail in *Railway Labor Association*, 339 U.S. at 146-54; *New York Dock Railway v. United States*, 609 F.2d 83, 86-90 (2d Cir. 1979).

in the future such conditions must be "no less protective of the interests of employees than those heretofore imposed." [3] In compliance with that statutory mandate, the Commission formulated the so-called "*New York Dock* conditions," [4] which provide, *inter alia*, for payment of the employee's full salary plus general wage increases and fringe benefits for six years after dismissal or displacement as a result of the merger. App. at 29a, 32a to 35a. The *New York Dock* conditions expressly provide that any dispute as to interpretation or application of the conditions is subject to binding arbitration. App. at 36a to 37a.

This case concerns the protective conditions imposed in the wake of the merger of petitioner, the Burlington Northern Railroad Company ("BN"), with the St. Louis-San Francisco Railway Company ("Frisco"). In the year-long hearings that preceded that merger, several organizations representing employees of BN, Frisco and certain competing railroads sought protection for their members against the economies created by the merger. In its 1980 order approving the merger, the Commission provided *New York Dock* conditions for "railroad employees" of the merged railroad whose jobs were affected by the merger but denied protection to employees of the compet-

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[3] Pub. L. No. 94-210, § 402(a), 90 Stat. 31, 62 (1976), amending 49 U.S.C. § 5(2)(f). The amendment required that the level of protection be no less favorable than the conditions previously imposed by the ICC pursuant to § 5(2)(f) and those imposed by the Secretary of Transportation pursuant to the Rail Passenger Service Act, 45 U.S.C. § 565.

[4] The name is derived from the proceeding in which these conditions were first formulated and imposed. *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979). These conditions are fully set forth in the Appendix at 29a to 42a.

ing railroads.[5] The Commission's decision was upheld by the Fifth Circuit and this Court denied certiorari.[6]

At the time of the merger, BN and Frisco each had a motor carrier subsidiary (BN Transport and Frisco Transportation Company). However, no organization representing the motor carrier employees intervened in the merger proceeding to seek protection. Shortly thereafter, a dramatic shift in the operating results of the two motor carriers occurred, with BN Transport ("BNT") achieving a turnaround from a $3.6 million loss in 1980 to a $900,000 profit in 1981, while Frisco Transportation Company ("FTC") suffered a decline from a $150,000 profit to a $750,000 loss during the same period.[7] Faced with this turn of events, and the fact that BNT (but not FTC) had just obtained 48-state unrestricted general commodities authority under the deregulatory Motor Carrier Act of 1980,[8] BN decided to terminate FTC's operations. As a result, most of the FTC employees were dismissed.

This case arose when respondents, a group of former union and management employees of FTC, filed a petition with the ICC asking that it reopen its earlier decision approving the BN-Frisco merger in order to "enforce" on their behalf the *New York Dock* protective conditions that had been ordered for the benefit of "railroad employees." After full consideration of the petitions and BN's reply, the Commission issued an order denying the petition.

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[5] *Burlington Northern, Inc.—Control & Merger—St. Louis-San Francisco Railway*, 360 I.C.C. 788, 1182 (1980) [hereinafter cited as *Merger Order*].

[6] *Missouri-Kansas-Texas Railroad v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981).

[7] *See* Reply of Burlington Northern Railroad Company to Petition to Reopen, Finance Docket No. 28583 (Sub-No. 1F) at 11 (citing 1981 Annual Reports to the ICC).

[8] Pub. L. No. 96-296, 94 Stat. 793 (1980).

The Commission first held that the claimants, as employees of a motor carrier subsidiary and not of the railroad itself, were not covered by the *New York Dock* conditions imposed in the 1980 Merger Order since those conditions were limited by their terms to "railroad employees." [9] This limitation was, the Commission noted, fully consistent with the statute, which requires the Commission "to impose labor protection conditions *only* on the merging railroads, not motor carriers or other entities that might be involved." App. at 17a.

The Commission further concluded that, although it has the discretion to impose labor protective conditions for the benefit of non-rail employees, it had not done so in this case. Indeed, claimants "did not request such protection" at the time of the merger, App. at 17a, and did not even appear in the merger proceeding. App. at 20a.

Finally, the Commission considered whether the merger proceeding should now be reopened and a supplementary order issued imposing protective conditions for the benefit of claimants. The Commission concluded that claimants had failed to demonstrate that "there was any misrepresentation on the part of BN during the merger proceeding that led [the ICC] to refrain from imposing conditions" to protect employees of the motor carrier subsidiaries. App. at 19a. The Commission accepted BN's explanation that the dismissals "were not contemplated by BN at the time of the merger, but resulted

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[9] The ICC's 1980 Merger Order had provided that:

> Railroad employees of the merged system and subsidiaries shall be entitled to the standard level of protection * unless an agreement is entered prior to merger, in which case protection shall be at the agreed level.

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* *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

Merger Order, 360 I.C.C. at 1182.

from changed business circumstances." App. at 19a. Thus the Commission concluded that the claimants had failed to show "good cause," as required by statute,[10] for the issuance of a supplemental order retroactively imposing employee protective conditions for their benefit.

On appeal, the Court of Appeals for the Eighth Circuit reversed. The Eighth Circuit concluded that the term "railroad employees" in section 5(2)(f)[11] encompasses the employees of any subsidiary whose operation "is a part of one of the merging railroad's overall transportation system." App. at 7a. The court reasoned that the motor carrier, which performed services auxiliary to and supplemental of rail services, was "intimately tied to the railroad's main transportation function," App. at 6a, and that its employees must thus be regarded as "railroad employees" entitled to the *New York Dock* conditions.

The Eighth Circuit then went on to address the issue of whether these particular claimants were "affected" by the merger within the meaning of the statute. Ignoring the mandatory arbitration clause in the *New York Dock* conditions, *see* App. at 36a to 37a, the court ruled that "[t]here is no doubt that the FTC employees were affected, i.e., 'touched significantly,' by the *BN-Frisco Merger*." App. at 3a.

Finally, the Eighth Circuit concluded that even if the employees of the motor carrier subsidiary were not "railroad employees" under section 5(2)(f), the Commission nevertheless abused its discretion in declining to grant them the same level of protection as the railroad employees. Pointing to fragmentary excerpts from the massive

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[10] Former § 5(9) of the Interstate Commerce Act, 49 U.S.C. § 5(10) (1976) (current version at 49 U.S.C. § 11351 (1982)).

[11] Section 5(2)(f) was recodified at 49 U.S.C. § 11347 in 1978. Since the majority of Commission decisions interpreting this section occurred prior to the recodification, this Petition, for consistency, refers to the statute as § 5(2)(f).

merger record,[12] the court concluded that particular statements of BN and Frisco officials constituted "representations" that the complaining employees would not be adversely affected, that their failure to intervene in the proceeding to seek protective conditions was thereby excused, and that they were now as a matter of law entitled to *New York Dock* conditions. App. at 7a to 14a.[13]

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT THE EMPLOYEES OF A RAILROAD'S MOTOR CARRIER SUBSIDIARY CONSTITUTE RAILROAD EMPLOYEES WITHIN THE MEANING OF 49 U.S.C. § 5(2)(f) IS A RADICAL DEPARTURE FROM PAST REGULATORY PRACTICES AND SHOULD BE REVIEWED BY THIS COURT

The court's holding that employees of a railroad's motor carrier subsidiary constitute "railroad employees" entitled to mandatory employee protection under 49 U.S.C. § 5(2)(f) is contrary to the clear language of the statute and overturns four decades of consistent construction and application by the ICC. The Commission's longstanding interpretation has been that section 5(2)(f) applies only to employees of the railroad itself, and that for employees of any non-railroads involved in the merger—including a motor carrier subsidiary—protec-

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[12] Although the merger record consisted of over 8,000 pages, the Commission's certified index to the appellate record, App. at 46a, reveals that only those few excerpts from the record singled out by complainants were transmitted to the court.

[13] The mandate of the court of appeals was not stayed and accordingly, on remand, the Commission issued an order reopening the proceeding, imposing *New York Dock* conditions for the complaining employees and referring the parties to negotiation or arbitration. Thereafter, the claimants filed a petition for reconsideration, requesting that the determination of the amount of benefits due each employee be assigned to an Administrative Law Judge. The Commission has not yet ruled on that petition.

tion is discretionary. While the Commission consistently imposes *New York Dock* conditions for the protection of railroad employees, in no instance has it ever granted motor carrier employees any greater protection than three months' severance pay.

The court's holding has broad implications for the transportation industry as a whole. Unions representing motor carrier employees have already seized upon the court's holding to urge, in virtually every pending railroad merger proceeding, that the Commission is required to impose *New York Dock* conditions to protect employees of motor carriers involved in the merger. Such an unwarranted expansion of the reach of a unique, narrowly drawn statute would impose unwarranted economic burdens on railroads seeking to improve their financial condition and economic efficiency through consolidations.

A. In the Forty-five Years Since Congress Enacted Section 5(2)(f), the Commission Has Consistently Denied Mandatory Labor Protection to Employees of a Non-Railroad Involved in a Rail Merger

Congress first enacted mandatory employee protection for railroad employees affected by a merger or consolidation as part of the Transportation Act of 1940.[14] That Act provided in relevant part:

> As a condition of its approval, under this paragraph or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require

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[14] That Depression-era statute was enacted in response to a financial crisis in the railroad industry: as of 1939, one-third of all railroad mileage was in bankruptcy, another third was on the brink, and thousands of railroad workers were unemployed. *See* S. Rep. No. 433, 76th Cong., 1st Sess. 1 (1939). As part of an effort to alleviate that crisis, Congress in § 7 of the Act sought to facilitate consolidation of weaker rail lines and mergers with solvent lines, and at the same time provide continuation of salary for laid-off workers during the depths of the Depression.

> a fair and equitable arrangement to protect the interests of the railroad employees affected.

49 U.S.C. § 5(2)(f) (1976).

The issue of whether "railroad employees" included employees of non-rail companies involved, as subsidiaries or otherwise, in a railroad consolidation arose just one year after enactment of section 5(2)(f). The Commission in *Baltimore Steam Packet Co. Acquisition, Control, Etc.*, 244 I.C.C. 583 (1941), explicitly held that the term "railroad employees" had a limited meaning and did not encompass individuals employed by a non-railroad company involved in a railroad merger, even if that company was engaged in the performance of a closely related transportation service. There, the railroads sought to acquire control of a water carrier for the purpose of providing intermodal rail-water transportation. Although it was conceded that some of the water carrier's employees would lose their jobs as a result of the transaction, the Commission declined to impose protective conditions for their benefit. The Commission reasoned that "[u]nder the maxim of law that *inclusio unius est exclusio alterius*, the mandatory provisions of subparagraph (f) apply only to transactions involving carriers by railroad, and require protection of railroad employees only . . . ." *Id.* at 604.

Since that time, in every railroad transaction in which the issue of protection for employees of a non-rail party or subsidiary was raised, the Commission has consistently held that such employees were not "railroad employees" within the meaning of the statute. For example, in a case involving the Penn Central merger,[15] the Commis-

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[15] The Penn Central merger had been approved by the ICC in *Pennsylvania Railroad—Merger—New York Central Railroad*, 327 I.C.C. 475 (1966), *modified*, 331 I.C.C. 643 (1967), *aff'd sub nom. Penn-Central Merger & N&W Inclusion Cases*, 389 U.S. 486 (1968). In that case each of the merging railroads—the Pennsylvania, the New York Central and the New Haven—owned one or more motor

sion held that the mandatory protection provisions of section 5(2)(f) did not apply to employees of two subsidiaries of the Penn Central—a rail refrigerator car service company and a warehouse company—whose functions were closely linked to the railroad's transportation system. *See Pennsylvania Railroad—Merger—New York Central Railroad*, 347 I.C.C. 536, 546-50 (1974). More recently, in approving the acquisition of a large water carrier, American Commercial Barge Line Co., by CSX, a railroad holding company, for the purpose of offering an integrated single-system rail-water transportation service,[16] the Commission denied employee protection for the water carrier employees.[17] *Accord Federal Barge Lines, Inc., Purchase*, 285 I.C.C. 439, 447 (19[illegible]).

Just as the early cases under the Act had distinguished between railroad employees and employees of a water carrier subsidiary, the Commission, driven by the language of the statute, has drawn a clear distinction between railroad employees and motor carrier employees. Section 5(2)(f) by its terms applied only to "railroad employees," and nowhere in the language of the statute

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carrier subsidiaries. 327 I.C.C. at 587, 592; 331 I.C.C. at 725. Yet it was never even suggested that employees of any of the motor carrier subsidiaries should receive protection pursuant to § 5(2)(f). In fact, even when the issue of protection for subsidiaries arose, no one suggested that the motor carrier employees were entitled to protection.

[16] *CSX Corp.—Control—American Commercial Lines, Inc.*, —— I.C.C. ——, Finance Docket No. 30300, slip op. at 5 (served Sept. 7, 1984), *appeal pending sub nom. Crounse Corp. v. ICC*, Nos. 84-3743 - 84-3753 (6th Cir. filed Sept. 10, 1984).

[17] *CSX Corp.*, slip op. at 63. CSX Corporation controls the Chesapeake and Ohio Railway Co. and its rail subsidiaries, the Seaboard System Railroad, Inc. and its rail subsidiaries, and the Richmond, Fredericksburg, and Potomac Railroad Company. CSX Corporation also controls two motor carrier subsidiaries, Chessie Motor Express, Inc. and Seacoast Transportation Co. *CSX Corp.*, slip op. at 4 n.5 & 5 n.6.

was there any suggestion that "railroad employees" [18] could include the employees of a motor carrier subsidiary, even though Congress was aware that many railroads owned motor carrier companies.[19] Former section 1(3)(a) of the Interstate Commerce Act provided a detailed definition of the term "railroad," but did not mention anything connected with motor carriage.[20]

At the same time that section 5(2)(f) of the 1940 Act prescribed mandatory protection for "railroad employees," a separate section, 5(2)(c), authorized discretionary pro-

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[18] While the recodification in 1978 deleted the term "railroad," see App. at 28a, Congress decreed that this change in language "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978). The court below inexplicably found the deletion of "railroad" to be significant, but ultimately decided not to rely on this change in language. App. at 5a to 6a. To the extent that the panel opinion accorded any substantive weight to the recodification, it was clearly in error. *See Cass v. United States*, 417 U.S. 72, 82 (1974); *City of Greenwood v. Peacock*, 384 U.S. 808, 815-16 (1966); *Atchison, Topeka & Santa Fe Railway v. United States*, 617 F.2d 485, 490 (7th Cir. 1980).

[19] *Omnibus Transportation Bill: Hearings on H.R. 2531 & H.R. 4862 Before the House Comm. on Interstate & Foreign Commerce*, 76th Cong., 1st Sess. 225-26 (1939) (testimony of George M. Harrison, Chairman, Railway Labor Executives' Association).

[20] The term "railroad" . . . shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transaportation or delivery of any such property.

49 U.S.C. § 1(3)(a) (1976). The Act separately defined "motor carrier" as a carrier by motor vehicle. 49 U.S.C. § 303(a)(16) (1976).

tection for motor carrier employees.[21] This distinction was created by the Conference Committee in response to a letter from Commissioner Eastman, Chairman of the Interstate Commerce Commission's Legislative Committee, who recommended that protection of motor carrier employees be made "discretionary rather than mandatory." [22]

As a result of this statutory distinction, an entirely different approach evolved with respect to protective conditions for employees of motor carriers than for railroad employees involved in a merger. In exercising its discretion under section 5(2)(c), the Commission has consistently refused to impose the same level of protection for motor carrier employees as is required for railroad employees, explaining:

> Had Congress intended to accord motor carrier employees the same protection granted railroad employees by section 5(2)(f), it would not have made the provisions of that section mandatory, while, at the same time, writing the discretionary provisions contained in section 5(2)(c). It is clear that section 5(2)(f), consisting of only three sentences, is limited to railroad employees, and, in this respect, contains no ambiguities. Any attempt on our part to interpret it as embracing motor carrier employees would be a usurpation of the congressional function of legislation.

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[21] The original language of the provision that became § 5(2)(f) was not expressly limited to "railroad" employees. At the same time that the Conference Committee added the discretionary provision for motor carrier employees, it inserted the word "railroad" in § 5(2)(f) limiting its scope to railroad employees.

[22] Letter from Chairman of the Legislative Committee of the Interstate Commerce Commission, 76th Cong., 2d Sess., Transmitting to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the House of Representatives a Report Relative to Omnibus Transportation Legislation, S. 2009, As Passed by Both Houses of Congress at 67 (Jan. 29, 1940).

Midwest Buslines, Inc.—Purchase—American Buslines, Inc., 97 M.C.C. 426, 439 (1964), *aff'd, American Buslines, Inc. v. United States*, 253 F. Supp. 481 (D.D.C.), *aff'd per curiam sub nom. Amalgamated Transit Union, AFL-CIO v. United States*, 385 U.S. 38 (1966); *accord Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.*, 97 M.C.C. 568, 578 (1964), *aff'd sub nom. American Buslines, Inc. v. United States*, 253 F. Supp. 481 (D.D.C.), *aff'd per curiam sub nom. Amalgamated Transit Union, AFL-CIO v. United States*, 385 U.S. 38 (1966).[23] As to motor carrier employees, the Commission has awarded a substantially lesser level of protection than for railroad employees, ranging from no protection at all to three months' severance pay.[24] The Commission's consistent refusal to extend to motor carrier employees the level of protection mandated by statute for railroad employees has been upheld by the courts.[25]

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[23] The Commission, in addition to discussing the statutory language and legislative history of § 5(2)(f), also focused on the differences between the motor carrier and railroad industries, noting that the skills of motor carrier employees are more readily transferable in the expanding motor carrier industry than are the more limited and unique skills of railroad employees. *Overnite Transportation Co.*, 97 M.C.C. at 579.

[24] *E.g., Interstate Motor Freight System—Purchase—Great Lakes Express Co.*, 122 M.C.C. 232, 238 (1975) (six weeks' severance pay); *Midwest Buslines, Inc.*, 97 M.C.C. at 442 (payment of moving expenses); *Baggett Transportation Co.—Purchase—Hunt Freight Lines, Inc.*, 87 M.C.C. 235, 236 (1961); *Trailways of New England, Inc.—Purchase—Boston & Maine Transportation*, 80 M.C.C. 697, 706-07 (1959) (no conditions imposed; jurisdiction retained for three years to impose such conditions as may be necessary); *Baggett Transportation Co.*, 75 M.C.C. 147, 152 (1958), *aff'd*, 87 M.C.C. 235 (1961); *Short Lines, Inc.—Purchase—New England Transportation Co.*, 75 M.C.C. 33, 38 (1958).

[25] *American Buslines, Inc.*, 253 F. Supp. at 483; *accord Walters v. Roadway Express, Inc.*, 557 F.2d 521, 523 n.2 (5th Cir. 1977); *see also New York Dock Railway v. Pennsylvania Railroad*, 62 F.2d 1010, 1014 (3d Cir. 1933) (operation by railroad of trucks from its terminals to deliver and receive freight is not a "railroad").

Thus, since passage of the Transportation Act of 1940, the Commission has consistently held that employees of a non-rail subsidiary of a merging railroad are not "railroad employees" within the meaning of section 5(2)(f) and are not entitled to protection under the mandate of that section. Moreover, in no case has the Commission ever awarded employees of a motor carrier—whether an independent motor carrier or a subsidiary of a railroad—a level of protection as extensive as that mandated by section 5(2)(f).

In the decision below, the court of appeals thus has reversed four decades of consistent interpretation and implementation of the statute by the Commission. In so doing, the court has wholly disregarded the principle that the interpretation of a statute by the agency charged with its administration is entitled to special deference when it originated at the time of enactment and has remained consistent over a long period of time. *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). Because the Eighth Circuit's radical departure from well settled law jeopardizes the balance of interests that has been developed by the Commission in the past forty-five years, it deserves plenary review by this Court.

B. The Court of Appeals' Holding Has Broad Implications for the Transportation Industry as a Whole

The court's holding that the employees of a railroad's motor carrier subsidiary are "railroad employees" has broad implications for past, present, and future transactions in the transportation industry. In recent years, the railroad industry has been marked by a wave of mergers.[26] Many of those railroads owned motor carrier subsidiaries, just as BN and Frisco did. In each decision authorizing a merger the Commission, as required by section 5(2)(f), imposed labor protective conditions

[26] In the past 28 years, all but six of the 28 Class I railroads have consummated one or more unifications with other railroads. Association of American Railroads, Railroad Ten-Year Trends, Vol. 1, Table I-2 (1984).

for the "railroad employees." The court of appeals' holding raises significant questions as to the scope of the employee protective conditions imposed in those consummated transactions. Under the court's reasoning, those railroads are all now in jeopardy of facing demands by employees of motor carrier subsidiaries for payment of *New York Dock* benefits.

In addition, the court's decision has already spawned extensive litigation before the Commission. Unions representing motor carrier employees are currently appearing in virtually every pending consolidation proceeding to argue that the opinion below mandates the imposition of *New York Dock* conditions to protect the employees of carriers involved in the transaction. *E.g., Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transportation Co.*, Finance Docket No. 30400 (I.C.C. filed Mar. 23, 1984); *Chicago, Milwaukee, St. Paul & Pacific Railroad—Reorganization—Acquisition by Grand Trunk Corp.*, Finance Docket No. 28640 (Sub-No. 9) (I.C.C. filed Aug. 5, 1982); *Norfolk Southern Corp.—Control—North American Van Lines, Inc.*, Finance Docket No. 30500 (I.C.C. filed Aug. 16, 1984). The unions urge that the six-year mandatory protection of *New York Dock* is required regardless of the type of service performed by the motor carrier subsidiary or whether it has any relation whatsoever with the railroad's transportation service. The reason is apparent—*New York Dock* conditions, which in effect require a railroad to keep employees on its payroll for six years after they are displaced as a result of the merger, are far more desirable to a union than the three months' severance pay (or less) they would otherwise be awarded by the ICC.

The court's holding threatens to have an even more significant impact in future transactions. Since 1980, the transportation industry has undergone dramatic and rapid changes as a result of the deregulatory Motor Car-

rier Act of 1980[27] and the Staggers Rail Act of 1980.[28] As barriers to railroad acquisition of motor carriers and water carriers are eliminated,[29] mergers between rail and non-rail carriers are likely to become more commonplace. By raising the specter of imposition of *New York Dock* conditions for employees of motor carriers involved in consolidations with railroads, the decision below undercuts such efforts to make the transportation industry more efficient and responsive to the nation's changing needs.

II. THE COURT OF APPEALS' DETERMINATION THAT THESE CLAIMANTS WERE AFFECTED BY THE MERGER WAS IN EXCESS OF ITS JURISDICTION

The court below decided not only that the former employees of Frisco's motor carrier subsidiary were "railroad employees" within the coverage of section 5(2)(f), but also that they were "affected" by the merger and hence entitled to mandatory six-year protection under that provision. Thus, at the same time that the court below vastly extended the scope of *New York Dock* to include non-railroad employees, it misapprehended the most fundamental principle guiding implementation of the *New*

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[27] Pub. L. No. 96-296, 94 Stat. 793 (1980).

[28] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

[29] The Commission has abolished the requirement that a railroad must demonstrate "special circumstances" in order to obtain unrestricted motor carrier operating authority by licensing or acquisition, thus greatly facilitating the establishment by railroads of motor carrier subsidiaries. *Applications for Motor Carrier Operating Authority by Railroads & Rail Affiliates*, 132 M.C.C. 978 (1982), *aff'd, American Trucking Associations, Inc. v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984); *Acquisition of Motor Carriers by Railroads*, —— I.C.C. —— (July 20, 1984), *appeal pending sub nom. American Trucking Associations, Inc. v. ICC*, No. 84-7545 (9th Cir. filed Aug. 20, 1984). The Commission has also adopted a new analytical approach of competitive impacts which eliminates barriers to railroad acquisitions of water carriers. *See* discussion of *CSX Corp., supra* p. 10.

York Dock conditions—that all disputes between the employer and employees as to application of the conditions will be submitted to arbitration. In deciding in a single stroke the intensely factual causation issue, the court below exceeded its own jurisdiction, ignored the basic structural concept of *New York Dock*, and undermined federal policy favoring arbitral rather than judicial resolution of labor disputes.

Under section 5(2)(f), an individual seeking protection must demonstrate both that he was an "employee" covered by that provision and that his employment status was "affected" by the merger. Here, claimants' general contention that they were "affected" by the shutdown of FTC's operations had been met by BN's response that the shutdown of FTC was not caused by the merger but by supervening regulatory developments and an unexpected downturn in FTC's profitability.[30] The individual circumstances leading to the dismissal of particular employees were never considered at all. Nevertheless, the court below peremptorily resolved the causation issue in a single paragraph, concluding that the FTC employees were necessarily "affected" by the merger because Burlington Northern would not have been able to phase out one of its motor carrier subsidiaries had it not acquired two subsidiaries by reason of the merger.[31]

In deciding whether the employees involved here were "affected" by the merger, the court below exceeded its own jurisdiction. Section 11 of the *New York Dock* conditions provides that "[i]n the event the railroad and its employees or their authorized representatives cannot set-

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[30] The Commission recognized that BN had a substantial argument on this point. *Burlington Northern, Inc.—Control & Merger —St. Louis-San Francisco Railway*, Finance Docket No. 28583 (Sub-No. 1), slip op. at 2 (Nov. 21, 1983) [hereinafter cited as *Reopening Denial*], App. at 16a to 17a.

[31] In fact, BN has subsequently sold BNT, the other motor carrier subsidiary held by it at the time of the merger.

tle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix . . . it may be referred by either party to an arbitration committee." *New York Dock Railway*, 360 I.C.C. at 87, App. at 36a. The decision of the arbitration committee is "final, binding, and conclusive." *Id.* at 88, App. at 37a. Both the courts and the Commission have held that the arbitration clause in section 11 imposes mandatory arbitration for determination of causation issues. *Walsh v. United States*, 723 F.2d 570, 574 (7th Cir. 1983); *Swartz v. Norfolk & Western Railway*, 589 F. Supp. 743, 746 (E.D. Mo. 1984); *Bell v. Western Maryland Railway*, 366 I.C.C. 64, 67 (1981).[32] While there is some disagreement as to whether the parties can together agree to waive the arbitration process,[33] the courts unanimously hold that each party has an absolute right to demand arbitration.

Mandatory arbitration of rail labor disputes originated with the Washington Job Protection Agreement in 1936, and the Commission has imposed mandatory arbitration in labor protective conditions since 1944. *Oklahoma Railway Trustees Abandonment of Operation*, 257 I.C.C. 177,

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[32] The Commission first used the phrase "may be referred to arbitration" in § 8 of the *Oklahoma* conditions. *Oklahoma Railway Trustees Abandonment of Operation*, 257 I.C.C. 177, 200 (1944). Both the courts and the Commission have interpreted this language as providing for mandatory arbitration. *E.g., Walsh*, 723 F.2d at 574; *Batts v. Louisville & Nashville Railroad*, 316 F.2d 22, 26-27 (6th Cir. 1963); *McLaughlin v. Penn Central Transportation Co.*, 384 F. Supp. 179, 185 (S.D.N.Y. 1974); *Southern Railway—Control—Central of Georgia Railway*, 317 I.C.C. 557, 566 (1962), *modified*, 317 I.C.C. 729 (1963).

[33] *Compare Nemitz v. Norfolk & Western Railway*, 436 F.2d 841, 849 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971), *and New Orleans & Northeastern Railroad v. Bozeman*, 312 F.2d 264, 268 (5th Cir. 1963), *with Walsh*, 723 F.2d at 574, *and Chesapeake & Ohio Railway v. Ford*, 590 F.2d 557, 559 (4th Cir. 1979), *and Batts*, 316 F.2d at 26. Although the issue was briefed to this Court in the *Nemitz* case, the Court did not address the issue.

200 (1944). As the Commission explained, it imposed a mandatory arbitration requirement so that "those who were most familiar with the complexities of labor law and the peculiar problems associated with railroad employees would determine disputes arising out of such conditions." *Leavens v. Burlington Northern, Inc.*, 348 I.C.C. 962, 975 (1977). In light of these arbitration provisions, the Commission has repeatedly recognized that it is without jurisdiction to determine individual causation issues. *See, e.g., Bell*, 366 I.C.C. at 67; *Leavens*, 348 I.C.C. at 979.

Similarly, in recognition of the importance of arbitration in the resolution of disputes over railroad employee protective conditions, courts throughout the nation have repeatedly held that they are without jurisdiction to decide the factual questions arising in such disputes.[34] Indeed, the courts have been particularly careful to avoid deciding the question of whether individual employees were "affected" by a merger or other transaction subject to protective conditions.[35]

In contrast, the court below has upset the carefully wrought structure of *New York Dock*. Even before the parties had an opportunity to request appointment of an

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[34] *Sorensen v. Chicago & North Western Transportation Co.*, 627 F.2d 136, 138 (8th Cir. 1980); *Held v. National Railroad Passenger Corp.*, 101 F.R.D. 420, 423-24 (D.D.C. 1984); *McLaughlin*, 384 F. Supp. at 183; *United Transportation Union v. Norfolk & Western Railway*, 332 F. Supp. 1170, 1174 (N.D. Ohio 1971); *Arnold v. Louisville & Nashville Railroad*, 180 F. Supp. 429, 434 (M.D. Tenn. 1960), *aff'd sub nom. Batts v. Louisville & Nashville Railroad*, 316 F.2d 22 (6th Cir. 1963); *see also Zapp v. United Transportation Union*, 727 F.2d 617, 625 (7th Cir. 1984); *Chesapeake & Ohio Railway v. Ford*, 590 F.2d 557, 559 (4th Cir. 1979); *Parsons v. Norfolk & Western Railway*, 442 F.2d 1075, 1078 (4th Cir. 1971); *O'Mara v. Erie Lackawanna Railroad*, 407 F.2d 674, 678 (2d Cir. 1969), *aff'd sub nom. Czosek v. O'Mara*, 397 U.S. 25 (1970).

[35] *See, e.g., Walsh*, 723 F.2d at 575; *McLaughlin*, 384 F. Supp. at 185; *Arnold*, 180 F. Supp. at 435-36.

arbitrator, the court of appeals reached out to decide the question of causation on the basis of the fragmentary record before it. Moreover, the court decided that FTC employees *as a group* were affected by the merger when that decision is more properly made on an individual, case-by-case basis. *See Arnold*, 180 F. Supp. at 436. Such action clearly exceeded the Eighth Circuit's jurisdiction.

The court's jurisdictional excess, moreover, has serious consequences far beyond this particular case. This Court has emphasized the strong federal policy that favors arbitration of labor disputes when mandated by statute or agreement. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 377-80 (1974). The reason for such policy is one of fundamental significance—the fact that courts simply are not equipped to deal with the extremely factual, industry-related issues involved in labor disputes. *Gateway Coal Co.*, 414 U.S. at 378; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). By brushing past the jurisdictional barriers and deciding in one terse sentence a complicated, multiparty causation issue, the court below has injected the judicial system into an area in which this Court has repeatedly held it does not belong. Its action was clearly improper and warrants prompt correction by this Court.

III. THE COURT OF APPEALS' ALTERNATIVE HOLDING CONSTITUTES AN IMPERMISSIBLE EXERCISE OF AN ADMINISTRATIVE FUNCTION

The Eighth Circuit further concluded that, even if the employees of the motor carrier subsidiary were not "railroad employees" entitled by law to mandatory labor protective conditions, the Commission on this record abused its discretion in failing to grant them the same *New York Dock* conditions as the railroad employees. This in no way constitutes a permissible alternative basis

for the decision below. On the contrary, even apart from the suspect basis for the court's conclusion,[36] its prescription of the precise form of relief to be granted in a reopened proceeding constitutes an impermissible intrusion into the administrative domain.

It is a fundamental principle of administrative law that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). Thus here, even if the court of appeals had properly concluded that the Commission abused its discretion in denying the petition to reopen,[37] the court should have simply ordered the Commission to correct its error by reopening the proceeding for further consideration in light of the principles laid down by the court. Instead, the court took upon itself the peremptory disposition of the very issue which should have been the whole subject of the reopening—the type of protective conditions, if any, which should be imposed for the benefit of employees of the motor carrier subsidiary.[38] The court's failure simply to remand, instructing the ICC

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[36] The Eighth Circuit, after reviewing isolated excerpts from the 8,000-page merger record, concluded that the motor carrier employees had been misled by "representations" of BN management as to the impact of the merger on employees. This conclusion is directly contrary to the Commission's finding that there was "no basis for concluding that BN misled petitioners or the Commission." *Reopening Denial* at 5, App. at 19a.

[37] This Court has stated repeatedly that administrative agencies should be required to reopen a proceeding only in "the most extraordinary circumstances." *Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 296 (1974); *see also Northern Lines Merger Cases*, 396 U.S. 491, 520-21 (1970); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-36 (1946); *ICC v. City of Jersey City*, 322 U.S. 503, 514-15, 519 (1944).

[38] As noted *supra* pp. 12-13 & n.24, there is no "standard" employee protective condition for motor carrier employees.

to decide this issue, was improper because "incompatible with the orderly function of the process of judicial review." *South Prairie Construction Co. v. Local No. 627*, 425 U.S. 800, 805-06 (1976) (summary reversal for failure to remand); *accord United States v. Saskatchewan Minerals*, 385 U.S. 94, 95 (1966) (summary reversal for failure to permit full consideration by ICC on remand); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-46 (1940); *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940).

The Eighth Circuit's order here is particularly egregious in two respects. First, this Court has held repeatedly that reviewing courts must defer to the broad discretion of administrative agencies to fashion remedies. *See, e.g., NLRB v. Food Store Employees Union*, 417 U.S. 1, 9-10 (1974); *Gilbertsville Trucking Co. v. United States*, 371 U.S. 115, 130-31 (1962); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-14 (1946). As this Court observed in *Food Store Employees:*

> [W]hen a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course.

417 U.S. at 10.

Second, the Interstate Commerce Act explicitly makes the level of protection for motor carrier employees a matter for the discretion of the Commission, 49 U.S.C. § 11344(b)(2)(D) (1982), and provides that the Commission's authority shall be "exclusive." 49 U.S.C. § 11341(a) (1982). In almost half a century, the Commission has *never* imposed benefits for motor carrier employees at a level even approaching the generosity of *New*

York Dock conditions.[89] Thus the court below has compelled the exercise of a discretionary agency function in a manner which the agency quite clearly would never have chosen itself.

The proper role of a court which has concluded that the Commission erred in failing to impose employee protective conditions was clearly articulated by this Court in *ICC v. Railway Labor Executives Association*, 315 U.S. 373 (1942). There this Court, after holding that the ICC had erred in concluding it had no authority to impose employee protective conditions in railroad abandonment proceedings, concluded that the "nature and extent" of any conditions to be imposed were "questions for the Commission to decide in light of the evidence." *Id.* at 380. The Eighth Circuit's failure to follow this direction clearly requires prompt correction.

CONCLUSION

For each of the foregoing reasons, the Court should grant this petition for certiorari.

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February 15, 1985

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[89] See discussion *supra* pp. 12-13 & n.24.

84-1319

No. 84-

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

RONALD L. COSBY, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1110

RONALD L. COSBY, *et al*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

BURLINGTON NORTHERN RAILROAD COMPANY,
Intervenor.

On Petition for Review of Orders
of the Interstate Commerce Commission.

Submitted: June 15, 1984

Filed: August 22, 1984

Before HEANEY and FAGG, Circuit Judges, and COLLINSON,* Senior District Judge.

HEANEY, Circuit Judge.

Ronald L. Cosby and more than one hundred other terminated employees of the Frisco Transportation Com-

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* The Honorable WILLIAM R. COLLINSON, Senior United States District Judge for the Eastern and Western Districts of Missouri, sitting by designation.

pany (FTC), a subsidiary of the St. Louis-San Francisco Railway Company (Frisco), requests this Court to review a decision of the Interstate Commerce Commission which denied them layoff benefits in accordance with employee protective conditions contained in a 1980 order approving the merger of the Burlington Northern (BN) and Frisco. 360 I.C.C. 788 (1980), *aff'd sub nom., Missouri-Kansas-Texas Railroad v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). We hold that the petitioners are entitled to receive benefits in accordance with the protective conditions contained in the 1980 order. We remand to the Commission for a computation of benefits.

The reasons for our decision are as follows:

(1) *The FTC employees are entitled to protective conditions under 49 U.S.C. § 11347 (1984). That section requires the Commission "to provide a fair arrangement * * * protective of the interest of employees who are affected by the transaction * * *."*[1]

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[1] 49 U.S.C. § 11347 provides in its entirety:

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of *employees who are affected by* the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangements and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period). Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1439. [Emphasis added.]

The history of protective provisions for employees of merging or consolidating rail carriers is recounted in *New York Dock Railway v. United States*, 609 F.2d 83, 86-90 (2d Cir. 1979). In 1933, Congress enacted the Emergency Railroad Transportation Act which mandated a job freeze to guarantee the continued employment of employees of consolidating railroads. Because of the extreme effect this approach could have on operational efficiency, railroads and labor organizations agreed to a job security arrangement that provided bargaining and compensation protection to employees, but allowed the railroads to reduce their work force. That agreement was the Washington Job Protection Agreement of 1936 (WJPA). In 1940, Congress amended the Interstate Commerce Act to include, *inter alia*, a labor protective provision modeled on the WJPA, 49 U.S.C. § 5(2)(f). That section was extensively revised in 1978 and recodified at 49 U.S.C. § 11347.

On its face, section 11347 applies to those who are (1) employees of one of the railroads participating in the merger,[2] and (2) affected by the transaction. There is no doubt that the FTC employees were affected, i.e., "touched significantly," by the BN-Frisco merger. *See Railway Labor Executives' Assoc. v. United States*, 216 F. Supp. 101, 102 (E.D. Va. 1963). After the merger, BN had two motor carriers operating under auxiliary-to-rail restrictions. Both companies serviced its rail business. After the deregulation of the carrier industries, BN had several options with respect to its motor carrier subsidiaries. It chose to expand the certificated authority of one of its motor carrier subsidiaries at the expense of the other. It expanded BN Transport's authority and FTC, still burdened by its traditional rail-related restric-

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[2] The provision generally does not cover employees of other railroads which might be affected by the merger. *Lamoille Valley Railroad v. Interstate Commerce Commission*, 711 F.2d 295, 323 (D.C. Cir. 1983); *Missouri-Kansas-Texas Railroad v. United States*, 632 F.2d 392, 412 (5th Cir. 1980).

tions, was unable to effectively compete. If FTC had not been made a subsidiary of BN as a result of the merger, BN could not have phased out FTC to make room for its other motor carrier subsidiary. Thus, FTC employees are clearly employees affected by the transaction.

They were also employees of Frisco, a participant in the merger. The Commission has "long considered that a carrier and its subsidiaries constitute a single transportation system with respect to transactions under section 5 of the Act." *Pennsylvania Railroad Company-Merger-New York Central Railroad*, 347 I.C.C. 536, 546 (1974) (citing *Louisville & J.B. & R. Co. Merger*, 290 I.C.C. 725, 733; 295 I.C.C. 11; *Woods Industries, Inc.-Control-United Transports, Inc.*, 85 M.C.C. 672, 675). As the Commission noted in *Pennsylvania Railroad*, "the parent, by reason of ownership, has the legal right to direct the affairs of the subsidiaries and the latter have no alternative but to accept this direction, even if such were to result * * * in complete abandonment of the subsidiaries' operations or the extinction of their corporate existence." *Id.* at 547. The Commission concluded in that case that the Act's mandatory protective provisions covered employees of rail carrier subsidiaries.

The Commission does not seem to contest the above conclusions, rather it contends that a third condition must be met before section 11347 is applicable—the employees of the railroad must also be railroad employees, that is, work for the railroad itself or a rail carrier subsidiary. Although section 11347 contains no such explicit condition, the Commission refers to the previous version of that provision, 49 U.S.C. § 5(2)(f). Section 5(2)(f) directed the Commission to "require a fair and equitable arrangement to protect the interests of the *railroad employees affected*." (Emphasis added.)[3] In

[3] 49 U.S.C. § 5(2) provides:

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad

Pennsylvania Railroad-Merger-New York Central Railroad, supra, 347 I.C.C. at 549, the Commission interpreted this phrase to mean that mandatory protective provisions did not extend to employees of non-rail subsidiaries. In the instant case, the Commission argues that because Congress only meant to clarify section 5(2)(f) by the rewording in section 11347 and not effect any substantive change, we should read the same restriction into the revised provision.

Congress amended section 5(2)(f) by substituting "employees who are affected by the transaction" for "railroad employees affected." We are hesitant to read into the revised provision the interpretation argued for by the Commission. If Congress meant for section 11347 to apply only to employees who worked for rail carriers and not all the employees affected by the merger, the clearest way to express this restriction would have been to leave the relevant language in section 5(2)(f) as it was.

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subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of *the railroad employees affected*. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; Feb. 28, 1920, c. 91, § 407, 41 Stat. 580; June 16, 1933, c. 91, Title II, §§ 201, 202, 48 Stat. 217; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905; Aug. 2, 1949, c. 379, § 3, 63 Stat. 485. [Emphasis added.]

We need not resolve this question of interpretation because we believe, in the circumstances of this case, that the FTC employees are "railroad employees" within the meaning of the Act. Supreme Court and Commission decisions have traditionally limited a railroad's authority to operate motor carrier companies to auxiliary-to-rail services unless special circumstances warranted expanded authority. *See American Trucking Associations v. United States*, 364 U.S. 1, 6 (1980); *American Trucking Associations, Inc. v. I.C.C.*, 722 F.2d 1243, 1244-1247 (5th Cir. 1984) (history of the auxiliary-to-rail restriction); *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91 (1954). The Commission determined both in the Merger Order and the Reopening Order that FTC's operations were generally restricted to service which was auxiliary to or supplemental of the Frisco rail service. FTC can thus be viewed as a part of Frisco's and, after the merger BN's, single transportation system. FTC was intimately tied to the railroad's main transportation function, in contrast to subsidiaries which are non-transportation oriented such as warehouse and mining enterprises. FTC employees should therefore be considered railroad employees.

The Commission objects to this line of reasoning, pointing out that employees of merging motor carrier companies are treated differently under the Act than employees of railway companies. Section 11344 (b) of the revised Act covers motor carrier mergers. It requires the Commission to "consider the interest of carrier employees affected by the transaction." 49 U.S.C. § 11344(b) (1984). Courts have recognized that the Commission has more discretion under this section in fashioning protective conditions for affected employees than it has under section 11347. *See Walters v. Roadway Express, Inc.*, 557 F.2d 521, 523 n.2 (5th Cir. 1977); *American Buslines, Inc. v. United States*, 253 F. Supp. 481, 483 (D. D.C. 1966); *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v.*

United States, 221 F. Supp. 958 (D. D.C. 1963) (applying statutory predecessors 49 U.S.C. §§ 5(2)(c) and 5(2)(f). The rationale for this distinction is that motor carrier employees do not need as much protection because their skills are more transferable than those of railway employees. *American Buslines, Inc. v. United States*, *supra*, 253 F. Supp. at 483.

The Commission cites these cases to support the proposition that section 11347 and its predecessor section 5(2)(f) have been consistently interpreted to exclude motor carrier employees. While we realize the Commission's interpretation should be given great weight, *e.g.*, *Perkins v. Matthews*, 400 U.S. 379 (1971), we think the Commission is clearly wrong. None of the cited cases involve motor carrier subsidiaries of railroads which exclusively operate auxiliary-to-rail services. The transactions in those cases were between motor carriers and were thus clearly covered by section 11344(b).[4] Here, however, the transaction is a merger between two railroads and the motor carrier in question is a part of one of the merging railroad's overall transportation system. Moreover, there is no evidence in the record that the skills of FTC's employees were transferable to general motor carrier services. Under the facts and circumstances of this case, we think section 11347 governs protective conditions for FTC employees.

(2) *Even if it is assumed that the Commission has discretion to grant or deny protective conditions to employees of motor carriers operating at the time of merger as FTC did here, under the facts and circumstances of*

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[4] *Walters v. Roadway Express, Inc.*, 557 F.2d 521 (5th Cir. 1977), involved the merger of two motor carrier companies. *American Buslines, Inc. v. United States*, 253 F. Supp. 481, 483 (D. D.C. 1966), consolidated three cases, involving the purchases of busline and motor carrier companies by other such companies. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. United States*, 221 F. Supp. 958 (D. D.C. 1963), involved the purchase of one busline by another.

this case, it was an abuse of discretion not to grant the FTC employees the same protective conditions granted to Frisco's other railroad employees.

In the BN-Frisco merger proceedings, officials of the BN and the Frisco stated that only a few employees of either company would be adversely affected by the merger and that those that were affected would be protected by standard employees protective conditions. The assurances were not limited to employees of the parent companies, BN and Frisco, nor were employees of the FTC told that they would not be protected. Thus no employee of the FTC had reason to seek to intervene in the merger proceeding or to request his union to do so. Moreover, specific assurances were given that there would be no change in the operation or services to be provided by the FTC.

Louis W. Menk, Chairman of the Board and Chief Executive Officer of BN, filed a vertified statement with the Commission as a part of the merger application. He stated:

> The public interest also involves the potential impact on the employees of the two companies. Overall, because of the higher traffic volumes, it is expected that there will be a slight increase in employment over that of the two roads in 1976. * * * *I would like to emphasize* that, because of labor protective conditions, *no employee will face involuntary unemployment as a direct result of this merger without ample financial protection.*

(Verified Statement of L. W. Menk, pp. 11-12 (emphasis added).

R. C. Grayson, Chairman, Chief Executive Officer and President of Frisco, also filed a verified statement with the Commission as part of the merger application. He stated:

The increases in traffic after 3 years will result in a slight increase in employment because of increased needs, especially in the states served by Frisco. * * *

* * * *

This end-to-end merger should not result, or in itself, decrease the number of competitors anywhere. Single line service will provide financial strength and should enhance competition and aid the industry in its competitive struggle with motor carriers, water carriers, and pipelines. The effect on employment will be minimal with some reductions and transfers, primarily in the headquarters and other staff functions. Because of the end-to-end merger, reductions generally will occur through attrition and increases in employment will primarily be in the operating area necessitated by increased traffic volume. *In fact, by three years after merger, the number of jobs on the combined system will have actually increased.*

Verified Statement of R. C. Grayson, pp. 8 & 20 (emphasis added).

Additional verified statements relating to employee protection were filed by the following:

M. M. Donahue, Vice President of BN:

The proposed merger will improve the quality and efficiency of rail service offered to our shippers, *produce no long-term adverse impact on our employees,* increase the rate of utilization and productivity of our human and physical assets, and will increase the financial strength of the consolidated company to a level exceeding that achievable by the two companies standing alone. *The beneficiaries will include* * * * *the railroad industry, and the merged company's employees* and owners.

The estimated financial benefits to the merged company will total $32.5 million in the third year of

operation. * * * Of course, these benefits will be diminished during the early years of merged operation when payments will be made to offset the adverse impacts *on our employees.*

* * * *

In any merger, there is some reduction in the work force of the predecessor companies. In the conduct of our merger studies, we were careful to identify potential adverse impacts on our employees. We then undertook an analysis of the protective payments and such related costs as those associated with employee transfers. Based on our analyses, it is estimated that the employee protective payments will total $16.0 million during the first year of merged operation, $7.8 million the second year, and $4.6 million the third year (in 1976 dollars).

Verified Statement of M. M. Donahue, pp. 3 & 12 (emphasis added).

C. M. Illg, Assistant Vice President-Labor Relations of BN:

The proposed merger of BN and Frisco is entirely end-to-end in nature with only two common points (St. Louis and Kansas City). The primary purpose of the merger is to improve the quality and efficiency of the rail services offered to our shippers, rather than elimination of duplicate routes and redundant facilities. Therefore, *while any merger of two companies requires some realignment of forces, this transaction is not intended to result in substantial permanent reductions in employment.* * * *

With the exception of clerical employees at Springfield, it is expected that the bulk of surplus employees created at any point and in any craft will be absorbed almost immediately on new positions and other vacanices caused by employees leaving service in the normal course of events, and by the demands of in-

creased traffic. Even at Springfield, where it is contemplated that a net surplus of clerical employees will result, the anticipated increased business indicates that opportunities will exist for retraining most of these surplus clerical employees for new careers in other crafts.

Those employees who do become surplus, or are displaced or are transferred due to the transaction, will be covered by protective benefits. * * * Since it is not practicable to pursue the kind of negotiations necessary to reach protective agreements with the employee representatives prior to submitting this application, and the ultimate success of any such negotiations depends upon the ability of many parties to reach mutually satisfactory arrangements, appropriate conditions to protect the interest of the employees to be imposed by the Commission must be considered. In light of the relatively limited impact that the proposed transaction will have on the employees, they will be adequately protected by the protective conditions provided for in Section 5(2)(f) of the Interstate Commerce Act, and the cost of protective benefits shown in Table B of Exhibit 10(iii), (iv) and (v) for employees represented by unions adversely affected by this transaction has been based on the assumed imposition by the Commission of those conditions.

Verified Statement of C. M. Illg, pp. 4-6 (emphasis added).

At the time the application for merger of the BN and Frisco was submitted, a supplement to that application was also submitted. In describing that supplement, the BN stated:

At the request of the Commission, we are filing herewith a supplement to the above-captioned application. The purpose of the supplement is to pro-

> vide data called for in Commission Form OP-F-45 concerning the Frisco Transportation Company, a wholly owned motor carrier subsidiary of the St. Louis-San Francisco Railway Company. This supplementary information is being provided since, if the rail merger sought in the above-captioned application is approved and consummated, Burlington Northern, Inc. would then also acquire control of Frisco Transportation Company.

Burlington Northern Letter to Mr. Marvin Bober, Assistant Deputy Director, Interstate Commerce Commission, dated January 13, 1978.

The supplement stated:

> With respect to all information required as Appendix D, see the Joint Application generally Section 1111.1(a) through (e) and exhibits. With respect specifically to Appendix D-7, *no changes are proposed in the operation of FTC.* No control will be obtained unless the rail merger proposed in the Joint Application is approved and consummated. Should that occur, *FTC operations will continue in the same manner as at present and will bear the same relationship to Frisco rail operations as they do now.* Thus BN as successor to Frisco will be enabled to use service by motor vehicle to public advantage in its operations to the same extent and in the same manner as Frisco does today. Neither will there be any change in the competitive relationships with respect to other motor carriers nor will competition be unduly restrained. *If any consolidation with BN's motor carrier subsidiary is proposed in the future, a separate application will be filed with the Commission at that time.*

Supplement to Application, Finance Docket No. 28583 Sub No. 1, dated January 13, 1978, pp. 1, 6-7 (emphasis added).

No studies were made by the BN or its transportation company as to the effect of the acquisition of the control of the FTC by the BN. In response to questions, an officer of the BN Transportation Company stated:

> Q [Questioning of Mr. Thomas.] * * * The witnesses for the railroad have testified to various [studies], effects of the merger between BN and Frisco. Were any studies made by you or your transportation company as to the effect of the acquisition of the control of the Frisco Transportation Company by the BN?
>
> A Not to my knowledge, no, sir.
>
> Q You have no knowledge of how that acquisition will affect your operation?
>
> A I know to this extent, that we are not engaged in any merger. It would be merely a change in ownership and therefore, we had no merger study per as with BN Transportation or BN, Inc., or anybody else.
>
> Q You assume, do you, that your operations will be conducted in the future as they are in the present?
>
> A Absolutely.
>
> * * * *
>
> Mr. Olsen. Your Honor, I would like to point out that all the material in the supplementary application which pertains to acquisition of control of Frisco Transportation Company, all of the material in this application with respect to Burlington Northern is taken out of the rail merger application or out of our R-1 reports to the Commission. *There is nothing in there beyond that other than the simple policy statement that no change will be made in the operation of Frisco Transportation.*

Tr. 3453-3459 (emphasis added).

In the light of these facts, we cannot agree with the Commission that the petitioners waived their right to receive

the benefits of the protective condition by not intervening. They had a right to rely on the representations that were made by the officers of BN and Frisco. Moreover, the petitioners offered to provide evidence of additional personal reassurances from Frisco officials that their jobs would be safe, but the Commission declined to receive this evidence. It can hardly be heard now to say that they waived their rights by not taking an active role in merger proceedings.

SUMMARY

In our view, the FTC employees are entitled to the benefit of the protective conditions heretofore made available to the employees of the BN and the Frisco because they are employees who were affected by the merger within the meaning of the Act; and, alternatively, because it was an abuse of discretion on the part of the Commission to deny them benefits in light of the representations made by the railroads at the time of the merger.

Reversed and remanded.

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 28583 (Sub-No. 1)

BURLINGTON NORTHERN, INC.—CONTROL AND MERGER—
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Decided: November 21, 1983

Service Date: November 29, 1983

In this and related proceedings, the Commission authorized the merger of the St. Louis-San Francisco Railway Company (Frisco) into Burlington Northern, Inc. (BN), subject to certain conditions.[1] Among the conditions imposed was a provision providing railroad employees of the merged system and subsidiaries, who had not negotiated separate employee protection agreements, with the level of protection authorized in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*).

Prior to the merger, Frisco Transportation Company (FTC) was a wholly-owned motor carrier subsidiary of Frisco, employing 162 people. Its operations were generally restricted to service which was auxiliary to, or supplemental of, Frisco rail service. Between the date of the merger (November 21, 1980) and the end of 1982, approximately 155 of the 162 FTC employees were terminated. The remaining 7 employees were transferred to other positions in the BN system. None of the terminated employees was afforded the benefits of the *New York Dock* employee protective conditions.

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[1] *Burlington Northern, Inc.-Control & Merger-St. L.*, 360 I.C.C. 784 (1980), *aff'd sub nom. Missouri-Kansas-Texas R. Co.* v. *United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied* 451 U.S. 1017 (1981).

By petition filed January 3, 1983, as supplemented February 23, 1983, and amended March 31, 1983, 112 former employees of FTC seek reopening of this proceeding pursuant to 49 U.S.C. 10327(g)(1) and 49 C.F.R. 1115.4 on the basis of new evidence, substantially changed circumstances, material error, and incomplete disclosure of facts in the original proceeding.

Petitioners note that the merger applicants contended "that any adverse impact on employees will be short term only and confined to relatively few locations. Because of labor protective conditions which are required by statute, no employee would face involuntary unemployment as a direct result of the merger without ample financial protection." 360 I.C.C. 823. They further note the opinion expressed by the Commission that the effect of the merger transaction upon FTC would be "merely a change in form, not substance" resulting from the change in its corporate parent from Frisco to BN. 360 I.C.C. 959.

Petitioners allege that the lay-off and termination of virtually all of the FTC employees was by prior design of BN management but was not disclosed to the Commission. In support of this contention, petitioners set forth a series of facts and alleged actions by BN linking the termination of their employment to the merger transaction. They request that the Commission enforce, for their benefit, the employee protective conditions imposed in the merger decision and urge reopening for this purpose.

BN replies that the lay-offs were not a "direct result" of the merger, but were caused by events subsequent and unrelated to the merger. The principal event was the acquisition in 1981 by BN's other motor carrier subsidiary, BN Transport, of expanded authority giving it *unrestricted* general commodity authority in 48 states. This new authority overlapped FTC's authority. FTC was, in addition, burdened with the traditional restriction that its service be limited to transportation which is auxiliary or supplementary to rail service. Furthermore, BN

Transport's 1981 financial results showed a great improvement over 1980, while FTC went from a 1980 profit to a substantial loss in 1981. Accordingly, BN revised its pre-merger plan to retain FTC essentially unchanged and elected to close down its less profitable motor carrier.

BN also contends that the labor protective conditions imposed by the Commission were limited to railroad employees and that the petitioning motor carrier employees are beyond the scope of the Commission's order. Finally, BN argues that petitioners should not be allowed to now raise an issue they could have raised during the merger proceedings, including the public hearings from May 1978 to June 1979. Numerous other employee interests did appear to protect their interests.

Under 49 U.S.C. § 11347 the Commission is required to impose labor protection conditions *only* on the merging railroads, not motor carriers or other entities that might be involved. *See Walters* v. *Roadway Express, Inc.*, 557 F.2d 521 (5th Cir. 1977). While this requirement applies to rail carrier subsidiaries of the merging carriers, it does not apply to non-rail subsidiaries. *See Pennsylvania Railroad—Merger—New York Central Railroad*, 347 I.C.C. 536, 549-51 (1974).

On the other hand, the Commission does have the discretion under 49 U.S.C. § 11344(c) to impose labor protection conditions for the benefit of non-rail employees. In the BN-Frisco merger, however, petitioners did not request such protection and we did not exercise our discretion to impose it. By its own terms Condition 6 of the Commission's order approving the merger applies only to "railroad employees." *See Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway*, 360 I.C.C. 788, 1182 (1980).

As we have indicated, petitioners seek a reopening of the merger to enforce conditions. But the conditions we imposed, *New York Dock*, are not applicable to petitioners. Furthermore, we refrained from exercising our dis-

cretionary power to impose conditions to protect these non-railroad employees. Accordingly, there are no protective conditions for their benefit which we can enforce.[2] Under such circumstances, reopening would be a meaningless gesture.

This analysis does not end the matter, however, because we may interpret the petition as also seeking to invoke our power to issue supplemental orders under former Section 5(9) of the Interstate Commerce Act, which became Section 5(10) in 1976. That section provided:

> The Commission may from time to time, for good cause shown, make such orders, supplemental to any order under paragraphs (1), (2), and (8) [authorizing the Commission to approve mergers and certain other transactions] as it may deem necessary or appropriate.[3]

We stated in *Norfolk & W. Ry. and New York, Chi. & St. L. R.R.—Merger*, 363 I.C.C. 270, 280 (1980) that, in the absence of substantial error, our power to issue supplemental orders pursuant to this provision "is limited to cases where a party has failed to comply with an express condition imposed by the Commission, or a representation made by the party, or when compliance is no longer in the public interest."

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[2] It is questionable whether we have any authority to impose a condition after consummation of a merger, absent a specific reservation of jurisdiction. See *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951). *Cf. Baltimore & O. R.R.* v. *United States*, 386 U.S. 372 (1967).

[3] As the Commission indicated in *Norfolk & W. Ry. and New York, Chi. & St. L. R.R. Merger*, 363 I.C.C. 270, 280 (1980), the 1978 codification of the Act omitted this section "as unnecessary in view of the restatement of the general investigatory and enforcement power of the Commission [in 49 U.S.C. 11701]." The N&W case recognized that this power remains with the Commission, since the codification may not be construed as effecting a substantive change. 363 I.C.C. at 280. See Note preceding 49 U.S.C. 10101.

As we have indicated above, there was no condition imposed in the merger for the benefit of petitioners. The only remaining question therefore concerns representations by BN. We have thoroughly reviewed the contentions of petitioners set forth in their pleadings, including the extensive "Petition to Amend Previous Petition to Reopen" filed after BN's Reply.[4] We are unable to conclude that petitioners have demonstrated there was any misrepresentation on the part of BN during the merger proceeding that led us to refrain from imposing conditions for petitioners' protection. We accept, and are satisfied with, BN's representations that the lay-offs experienced by petitioners were not contemplated by BN at the time of the merger, but resulted from changed business circumstances.

In particular, all of the "new" material advanced by petitioners in their "Petition to Amend" (except one assertion, which we will discuss), even when viewed in the light most favorable to petitioners, at most illustrates steps taken by BN *after* the merger. None of that evidence, even if accepted as true, shows that BN misrepresented its intention *before* the merger. The only portion of the "Petition to Amend" bearing on the issue of misrepresentation is the allegation that FTC employees were advised on several occasions that their jobs would be protected as a result of the merger. This allegation is entirely unsupported, however, and contains no detail on the form the alleged representations took. We can not credit these assertions, and find no basis for concluding that BN misled petitioners or the Commission.

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[4] BN moves to strike this pleading as a reply to a reply prohibited by 49 C.F.R. 1104.13(c) of the Commission's Rules of Practice. While our rules do not permit replies to replies, it would serve no purpose to reject the pleading here as petitioners could merely file it again as another petition to reopen. Moreover, in view of our disposition of the issue, BN will not be prejudiced.

Accordingly, there was no failure to disclose on BN's part which would amount to the "good cause" necessary for us to now issue a supplemental order.

In addition, petitioners have failed to give any satisfactory explanation for their failure to seek protective conditions during the merger proceedings. We have found that BN did not mislead in its merger application, and numerous employee organizations appeared in this extended and widely-publicized proceeding to protect their interests. *See* 360 I.C.C. 840-41. Petitioners could easily have participated.

Finally, we call to mind the principle reiterated recently in *Mobil Oil Corp.* v. *ICC*, 685 F.2d 624, 631 (D.C. Cir. 1982):

> "Both the Supreme Court and this Court consistently have subscribed to the rule that administrative agencies are not to be required to reopen their final orders 'except in the most extraordinary circumstances'" (footnote omitted). The rationale underlying this rule was articulated by the Supreme Court in *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-15 (1946): "[I]f upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process would ever be consummated in an order that would not be subject to reopening."

This decision will not significantly affect either the quality of the human environment or energy consumption.

It is ordered:

1. The petition to reopen is denied.

2. BN's motion to strike is denied.

3. This decision is effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

JAMES H. BAYNE
Acting Secretary

(SEAL)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

No. 84-1110

RONALD L. COSBY, *et al.*,
Petitioners,

vs.

ICC & U.S.A.
Respondents.

Petition for Review of Order of
Interstate Commerce Commission

JUDGMENT

This cause came to be submitted on the record from the Interstate Commerce Commission and briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the Interstate Commerce Commission, is hereby, reversed and remanded to the commission with directions consistent with the opinion of this court.

August 22, 1984

Costs of petitioners for briefs for
recovery from respondents: $126.75

[Filed August 22, 1984
Robert D. St. Vrain, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-1110

RONALD L. COSBY, *et al.*,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION,
AND UNITED STATES OF AMERICA,
Respondents.

BURLINGTON NORTHERN RAILROAD COMPANY,
Intervenor

Petition for Review of Order of
Interstate Commerce Commission

Intervenor Burlington Northern Railroad Company's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

Judge Bright did not participate in the consideration of the petition.

October 18, 1984

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 28583 (Sub-No. 1)

BURLINGTON NORTHERN, INC.—CONTROL AND MERGER—
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Decided: December 21, 1984

Service Date: January 8, 1985

Pursuant to the decision in *Cosby* v. *ICC*, 741 F.2d 1077 (8th Cir. 1984), vacating the Commission's decision of November 21, 1983, and remanding the case, we are reopening this proceeding and imposing employee protective conditions at the level authorized in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*) for the benefit of the former employees of the Frisco Transportation Company.

Counsel for the employees has suggested, in his letter of October 24, 1984, that the Commission assign the task of determining individual benefits to an administrative law judge. *New York Dock* encompasses the substantive benefits to which affected railroad employees are entitled and the procedures to be used in applying for these benefits. Binding arbitration is prescribed if the parties are unable to reach agreement on the application of any provision of the *New York Dock* conditions. 360 I.C.C. at 87-88. The arbitration panel, not the Commission, determines individual benefits. *See Walsh* v. *United States*, 723 F.2d 570 (7th Cir. 1983). Accordingly, we will not become involved in an area that should be resolved by the parties' negotiations or arbitration in accordance with the *New York Dock* conditions.

Petitioners' motion filed October 26, 1984, to add additional parties as petitioners will be dismissed as moot.

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The proceeding is reopened.

2. The former employees of Frisco Transportation Company are granted the level of protection authorized in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

3. Petitioners' motion to additional parties as petitioners is dismissed.

4. This decision is effective on its date of service.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett, Gradison, Simmons, Lamboley, and Strenio.

JAMES H. BAYNE
Secretary

[SEAL]

STATUTES

Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(c) (1976), provides:

> (c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f) (1976), provides:

> (f) As a condition of its approval, under this paragraph or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than

those imposed before February 5, 1976, pursuant to this subdivision and those established pursuant to section 565 of Title 45. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may be entered into after September 18, 1940, by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 11344(b)(2) of the Interstate Commerce Act, 49 U.S.C. § 11344(b)(2) (1982), provides:

> In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:
>
> (A) the effect of the proposed transaction on the adequacy of transportation to the public.
>
> (B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.
>
> (C) the total fixed charges that result from the proposed transaction.
>
> (D) the interest of carrier employees affected by the proposed transaction.

Section 11344(c) of the Interstate Commerce Act, 49 U.S.C. § 11344(c) (1982), provides:

> (c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and

authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347 (1982), provides:

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

LABOR PROTECTIVE CONDITIONS

In *New York Dock Railway—Control—Brooklyn Eastern District*, 360 I.C.C. 60, 84-90 (1979), the Commission set forth the following as the standard level of protection mandated by 49 U.S.C. § 11347 (1982):

> Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:
>
> 1. *Definitions.*—(a) "Transaction" means any action taken pursaunt to authorizations of this Commission on which these provisions have been imposed.
>
> (b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
>
> (c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.
>
> (d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee

was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. *Notice and agreement or decision.*—(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said

five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. *Displacement allowances.*—(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately

preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and *provided further*, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. *Dismissal allowances.*—(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and con-

tinuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. *Separation allowance.*—A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. *Fringe benefits.*—No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. *Moving expenses.*—Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; *provided, however*, that changes in place of residence which are not a result of the transaction, shall not be con-

sidered to be within the purview of this section; *provided further*, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. *Arbitration of disputes.*—(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to selects its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall

have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. *Losses from home removal.*—(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later

restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in

securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprises within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprises for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any

of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established un-

der 49 [illegible] 11347 before February 5, 1976 and under se[illegible] 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH JUDICIAL CIRCUIT

Case No. 84-1110

RONALD L. COSBY, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA,
Respondents.

REQUESTED DESIGNATED PORTION OF RECORD BY APPELLANTS

1. Published notice of *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company*, Finance Docket No. 28583, Sub-No. 1.

2. Published notice of *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company—Control of Frisco Transportation Company*, Finance Docket No. MC-F-13500.

3. Original application of Burlington Northern, Inc. and St. Louis-San Francisco Railway Company in Finance Docket No. 28583, Sub-No. 1, and particularly pages 6, 7, 10, 54, 55, 62, 63, as well as attached verified statements as follows:

   a. Verified Statement of L.W. Menk, Chairman of BN;

   b. Verified Statement of R.C. Grayson, Chairman of the Board of Frisco;

c. Verified Statement of M.M. Donohue, Vice President BN;

d. Verified Statement of C.E. Able, Vice President, BN;

e. Verified Statement of C.M. Illg, Assistant Vice President, Labor Relations, BN; and

f. Verified Statement of M. Michael Smilin, Director—Employee Services, BN.

4. Letter from I.C.C. directing BN to file control application for Frisco Transportation Company (January, 1978).

5. Letter of Byron D. Olsen to Marvin Bober, Assistant Deputy Director, dated January 13, 1983, with pleading entitled "Supplement to Application", docketed as MC-F-13500 (copies of which are attached).

6. Oral hearing transcript, particularly pages:

a. 217—testimony of Mr. Menk (copies of which are attached);

b. 601 through 605—testimony of Jack D. Round (copies of which are attached);

c. 3330 through 3340—testimony of Mr. Illg (copies of 3330, 3331, 3332, 3333, 3334, 3336 and 3340 are attached);

d. 3453 through 3463—testimony of L.A. Thomas (copies of which are attached).

7. Hearing Exhibit 52 -Statement of L.A. Thomas.

8. Letter from Richard M. Bresler, President and Chief Executive Officer of Burlington Northern to Commissioner Thomas A. Trantham dated January 28, 1981.

9. I.C.C. Decision dated May 14, 1982 and served May 21, 1982 in *Burlington Northern, Inc.—Control and*

Merger—St. Louis-San Francisco Railway Company, Finance Docket No. 28583, Sub-No. 1; and *Great Northern Pacific and Burlington Lines, Inc.—Merger—Etc.—Great Northern Railway Company, et al.*, Finance Docket No. 21478.

10. I.C.C. Decision decided January 28, 1983 in *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company*, Finance Docket No. 28583, Sub-No. 1.

11. I.C.C. Decision decided March 25, 1980 and served April 17, 1980 in *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company*, Finance Docket No. 28583, Sub-No. 1.

INTERSTATE COMMERCE COMMISSION
Washington, D.C. 20423

Office of the Secretary

I, JAMES H. BAYNE, Acting Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Item No.	Item
1.	FEDERAL REGISTER NOTICE published 1/27/78
2.	FEDERAL REGISTER NOTICE published 1/27/78
3.	APPLICATION (pages 6, 7, 10, 54, 55, 62, 63 as specified) filed 12/28/77 and Verified Statements (a through f)
4.	LETTER from I.C.C. directing BN to file control application for Frisco Transportation Company (January, 1978) (copy cannot be located)
5.	LETTER of Byron D. Olsen to Marvin Bober, dated 1/13/83, with pleading entitled "Supplement to Application", docketed as MC-F-13500
6.	ORAL HEARING TRANSCRIPT (pages 217, 601 through 605, 3330 through 3340, and 3453 through 3463 as specified)
7.	HEARING EXHIBIT 52 (copy cannot be located)
8.	LETTER from Richard M. Bresler, to Commissioner Thomas A. Trantum dated 1/28/81 (copy cannot be located)
9.	DECISION, by Chairman Taylor, Vice Chairman Gilliam, Commissioners Gresham, Sterrett, Andre, and Simmons. Commissioner Simmons did not participate, served 5/21/83

PARTIES TO THE PROCEEDINGS BELOW

In addition to Ronald L. Cosby, named in the caption, the following individuals also appeared before the Interstate Commerce Commission and the Court of Appeals for the Eighth Circuit as petitioners:

J. T. Agee
W. Archer
D. L. Arnett
H. E. Arnold
W. R. Benda, Jr.
R. W. Bowman
J. H. Bosley
E. L. Brimmer
C. Bush
A. G. Calentine
D. P. Camdem
J. W. Campbell
L. L. Carroll
R. H. Chestnut
P. D. Clark
J. B. Clouse
D. L. Clymore
D. J. Collins
M. E. Cooksey
W. Cooper
P. H. Cox
B. D. Coy
R. Cummins
E. F. Deppeler
C. L. Devine
N. Dintelman
S. L. Dismang
J. L. Elledge
R. N. Embree
R. Etherton
W. E. Fisher
A. Frankenreiter
N. L. Frost
J. D. Gage
K. Garrison
D. W. Gouge
J. C. Gouge
C. H. Green
C. H. Greer
W. G. Grider
E. R. Hanna
R. H. Hawk
K. L. Hendrix
G. T. Hicks
K. C. Hollandsworth
D. M. Hullen
G. D. Irwin
J. L. Italiano
D. Johnson
W. R. Jones
G. Kelly
E. Ker
T. M. Kinsey
B. W. Larose
P. L. Latimer
D. Lee
J. W. Long
C. B. Lovins
J. R. Maggard, Jr.
B. H. Manning
F. E. Marciniak
J. R. Martin
D. E. Masson
R. M. McClaury
N. J. McKee
H. D. Means
G. L. Melton
D. D. Miller
G. D. Moody
S. L. Moore
N. C. Parson
A. Petelin
O. O. Pfeifer
T. S. Pliler
R. S. Plunkett
J. D. Porter
S. Rader
P. A. Reeves
G. R. Robinson
D. R. Rose
L. W. Roth
C. C. Romlett
J. J. Sanders
K. Scanlon
D. G. Schmied
P. Schmouty
E. F. Sensmeyer
K. W. Sharp
R. W. Shelley
J. H. Sherman
D. E. Smith
F. E. Smith
M. A. Smoot
J. D. Stanley
J. L. Stoker
H. H. Stubbs
W. M. Tatum
E. N. Taylor
D. W. Thorne
J. W. Tipton
J. P. Trask
C. A. Turner
L. E. Tuter
W. V. Walton
J. H. Watts
J. W. White
P. Williams
R. C. Williams
B. G. Wolfe
J. T. Wormsley
J. M. Zeller

Office-Supreme Court, U.S.
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No. 84-1313

In the Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY
Petitioner,

vs.

RONALD K. COSBY, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

In December, 1977, Burlington Northern, Inc. ("Petitioner" or "BN")[1] and St. Louis-San Francisco Railway Company ("Frisco") filed a joint application to merge with the Interstate Commerce Commission ("I.C.C."). Both BN and Frisco were common carriers by railroad and both operated wholly-owned subsidiary motor carriers, which were subject to the jurisdiction of the I.C.C. BN's motor carrier subsidiary was BN Transport ("BNT") and Frisco's wholly-owned motor carrier subsidiary was Frisco Transportation Company ("FTC"). FTC's certificate to operate

1. In the initial I.C.C. proceeding, the applicant was Burlington Northern, Inc. Petitioner advises the Court that some type of reorganization has subsequently occurred which makes it necessary for the petition to be filed by Burlington Northern Railroad Company. Respondents have no knowledge concerning that reorganization. For the purpose of this brief, both companies will be referred to simply as "Petitioner".

as a motor carrier was restricted to service "auxiliary to or supplemental of rail service."[2] The Respondents are individuals who were employees of FTC at the time of the merger. Petitioner also filed a required I.C.C. application to control FTC because if the railroad merger was granted, BN would automatically control FTC and I.C.C. approval was, therefore, necessary. The I.C.C. consolidated the railroad merger application and the application to control FTC and issued an order aproving both transactions by Decision dated March 25, 1980 and served April 17, 1980 (hereinafter "Merger Order"). The Merger Order, styled *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company and Burlington Northern, Inc.—Control—Frisco Transportation Co., Inc.*, was published at 360 I.C.C. 783.

In the initial I.C.C. proceeding, various officials of Petitioner, Frisco and FTC testified and represented that the employees would not be adversely affected and that any employee adversely affected would receive employee protective benefits.[3] In obvious reliance on those representations, the I.C.C. concluded in its Merger Order that the effect of the merger on FTC would be merely a change in form, not substance.[4] Recognizing that it was required

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2. Historically railroads were not permitted to operate unrestricted motor carrier operations unless a "special circumstance" test was met. That history was announced in *U.S. v. Rock Island Motor Transit Co.*, 340 U.S. 419 (1951). The special circumstance requirement has subsequently been abolished. *See, Applications for Motor Carrier Operating Authority by Railroads and Rail Affiliates*, 132 I.C.C. 978 (1982), *aff'd sub nom. American Trucking Associations, Inc. v. I.C.C.*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S.Ct. 324 (1984).

3. For the purposes of brevity, the representations made were incorporated into the Order of the Court of Appeals for the Eighth Circuit and are found at Petitioner's Appendix A, pp. 8a through 13a.

4. 360 I.C.C. at 959.

by 49 U.S.C. Section 11347 to consider the interests of carrier empolyees involved, the I.C.C. ordered that railroad employees of the merged system and subsidiaries were entitled to the standard level of protection.[5]

Following the merger of the parent railroads, Petitioner ended up with one railroad and two wholly-owned motor carrier subsidiaries, namely FTC and BNT. Petitioner elected to obtain broad unrestricted operating authority for BNT but not for FTC and in pursuing this course for FTC, Petitioner further elected to abandon FTC's operating certificates with the I.C.C. and the State of Missouri. Petitioner ultimately merged FTC into BNT and all but seven of the FTC employees (including Respondents herein) lost their jobs.[6]

Respondents filed a Petition to Reopen with the I.C.C. to acquire the employee protective benefits promised by Petitioner and Frisco and ordered by the I.C.C.[7] The I.C.C. denied the relief requested by Respondents by Decision dated November 21, 1983 and served November 29, 1983.[8] Respondents timely appealed to the United States Court of Appeals for the Eighth Circuit. Petitioner requested leave to intervene on behalf of the I.C.C. and leave was granted. The matter was fully briefed and argued by all parties, including Petitioner herein, and by Order filed August 22, 1984, Honorable Judges Heaney, Fagg and Collinson unanimously ruled in favor of Respondents.[9] In that Order the Eighth Circuit fully considered

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5. 360 I.C.C. at 1182.

6. Merger Order. *See*, Brief for Petitioner, Appendix at 15a.

7. *See*, 49 U.S.C. Section 10327(g)(1) and Rule 49 C.F.R. 1100.98(d).

8. *See*, Brief for Petitioner, Appendix at 15a through 21a.

9. *See*, Brief for Petitioner, Appendix at 1a through 14a.

all arguments presented and held Respondents herein were entitled to receive benefits in accordance with the protective conditions contained in the I.C.C.'s 1980 Order and remanded the case to the I.C.C. for a computation of benefits. At no time did the Petitioner herein, the I.C.C. or the Department of Justice object to the jurisdiction of the Eighth Circuit to rule on the relief sought.

Petitioner timely filed a Petition for Rehearing with the Eighth Circuit and said Petition was denied.[10] Subsequently the I.C.C. reopened the merger proceeding for the purpose of imposing employee protective conditions for Respondents by Decision dated December 21, 1984 and served January 8, 1985.[11]

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10. *See*, Brief for Petitioner, Appendix at 23a.

11. *See*, Brief for Petitioner, Appendix at 24a-25a.

SUMMARY OF THE ARGUMENT

Petitioner claims the Eighth Circuit has departed from the precedent of the I.C.C. and in so doing has exceeded its jurisdiction and usurped the function of the I.C.C. Petitioner also claims the Eighth Circuit ruling has broad industry overtones which warrant review by this Court.

Respondents submit these claims are not well founded. The I.C.C. and the Department of Justice have determined not to seek review of the Eighth Circuit ruling. Respondents believe the I.C.C. has not sought review because it recognizes the ruling was specifically based on the unique facts of this case and that no broad industry-wide implications exist. More specifically, the "auxiliary-to-rail" restriction contained in FTC's operating authority limited FTC's scope of operations to rail-rleated movements. Such restriction probably no longer exists in other rail wholly-owned motor carrier subsidiaries following the enactment of legislation and the adoption of regulations which have subsequently abolished the requirement for railroads to have restricted motor carrier certificates. Furthermore, the Eighth Circuit ruling relied greatly on specific representations and promises made by numerous officials of Petitioner in the I.C.C. proceeding which representations make the facts of this case unique.

The Petitioner raises arguments in its Petition concerning jurisdiction and arbitration. Respondents requested relief from the I.C.C. on January 3, 1983. Petitioner briefed its position before the I.C.C. and the Eighth Circuit and never presented any argument on these points. Therefore, those issues were not preserved and should not be raised for the first time before this Court.

There is no conflict between circuits on the question of employee protection in cases involving employees of a wholly-owned motor carrier subsidiary of a railroad. Therefore, review by this Court is not necessary to resolve such conflict.

The Eighth Circuit ruling is fair and correct. The lower court fully considered the law, Congressional intent and the undisputed facts in reaching its decision. Petitioner has shown no manifest unfairness which would warrant review. Petitioner claims the Court of Appeals exceeded its jurisdiction by structuring a level of benefits for Respondents which it argues should have been left to the discretion of the I.C.C. The Court of Appeals simply found that Respondents were members of the class subject to the benefits previously structured by the I.C.C. in its Merger Order. Thus, the Court of Appeals was well within statutory jurisdiction and authority. Therefore, the Petition for a Writ of Certiorari should be denied.

ARGUMENT IN OPPOSITION TO WRIT OF CERTIORARI

A. Neither the Interstate Commerce Commission nor the Department of Justice Has Requested Review of the Order of the Eighth Circuit.

At the outset it should be noted that the primary petitioners in an appellate proceeding involving the exercise of administrative agency authority would normally be the agency involved and the Department of Justice. In this case, the I.C.C. fully briefed and orally argued the issues before the Eighth Circuit. Neither the I.C.C. nor the Department of Justice filed a Petition for Rehearing with the Eighth Circuit nor have they applied for a Writ of Certiorari with this Honorable Court. Respondents believe this action on behalf of the I.C.C. is based on its recognition that the facts involved in this case are materially different from other proceedings now pending before it and that a review by this Honorable Court is neither warranted nor necessary.

B. The Holding of the Court of Appeals Does Not Have Broad Implications on the Transportation Industry.

Petitioner suggests the Eighth Circuit's holding has broad implications on the transportation industry as a whole. This argument ignores the fact found by both the I.C.C. and the Eighth Circuit that Respondents' former employer, FTC, was limited in its operation to providing auxiliary-to-rail services. This argument further ignores the enactment of the Motor Carrier Act of 1980, PL. 96-258, 94 Stat. 427, and the abolishment of the special circumstances test which historically prevented railroads from obtaining broad unrestricted motor carrier authority.[12]

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12. *See, supra*, note 2.

Thus, virtually any person, including railroads, may now obtain broad unrestricted motor carrier authority from the I.C.C. Respondents seriously doubt that following this so-called "deregulation", any auxiliary-to-rail restrictions remain. Therefore, it is extremely unlikely a case under these facts will arise in the future.

Petitioner argues that unions are urging employee protection in several cases presently pending before the I.C.C. based on this Eighth Circuit ruling.[13] Respondents are familiar with the Decision of the I.C.C. in only one of those cited cases, namely *Chicago, Milwaukee, St. Paul and Pacific Railroad—Reorganization—Acquisition by Grand Truck Corporation*, Finance Docket No. 28640 (Sub-No. 9). In that case the I.C.C. has issued a Decision bearing service date January 11, 1985 in which motor carrier employees were denied employee protective conditions. In that ruling, the I.C.C. distinguished the present Eighth Circuit ruling on the basis of the auxiliary-to-rail limitations found in this case. While Respondents do not wish to argue the merits of that case herein, they believe it is pertinent to point out that the I.C.C. apparently is not construing this Eighth Circuit Order as a precedent to be followed in every case involving railroads with motor carrier subsidiaries. Consequently, Petitioner's claim of broad industry-wide implications appears to be overstated.

Even if the I.C.C. were to view the Eighth Circuit's Order as an industry-wide precedent for granting employee protective conditions to motor carrier subsidiaries of all railroads without limitation, review by this Court would be more appropriate in a future case involving no restrictions.

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13. *See*, Brief for Petitioner at 16, note 29.

C. The Petitioner Requests Review of Matters Not Presented to the Eighth Circuit and Therefore Not Preserved for Review.

The Petitioner argues that the Eighth Circuit exceeded its jurisdiction by determining issues which should have been subject to arbitration and that the Eighth Circuit erred by directing the I.C.C. to grant this particular relief. Neither the Petitioner, the I.C.C. nor the Department of Justice raised these issues before the Eighth Circuit when it granted the specific relief requested by the Respondents herein. Supreme Court Rule 15(g) requires the Petitioner to specify "the stage in the proceedings (both in the Court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the Court." A review of the Petitioner's statement of the case demonstrates no jurisdictional issues, arbitration issues or issues relating to a grant of particular relief were presented to the Eighth Circuit in compliance with Rule 15(g).

Respondents' first formal pleading before the I.C.C. was filed January 3, 1983.[14] Since that first pleading, Respondents have consistently requested the exact relief ordered by the Eighth Circuit. Petitioner never raised the jurisdiction or arbitration issues before the I.C.C. nor before the Eighth Circuit. Petitioner's first request (or demand) for arbitration is contained in its Petition for Writ of Certiorari.

This Court has consistently held that matters not raised and preserved are waived and cannot be presented for the first time before it. As stated in *State of Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976):

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14. *See*, Brief for Petitioner, Appendix at 16a.

> "This assertion was not pleaded in respondent's complaint, was not considered by the District Court or the Court of Appeals, and accordingly, is not before us."

Furthermore, this Court stated in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967):

> "This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari, even though the relevant portions of the transcript were made a part of the record on appeal. Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here."

Respondents submit the questions which were not previously presented should not be considered at this late stage of the proceeding and the Petition for Writ of Certiorari on those issues should therefore be denied.

D. There Is No Conflict Among the Circuit Courts of Appeal on the Issues Presented.

One of the most basic reasons for a review by this Court is a conflict of law between the circuits. In this instance no such conflict exists. While this Court and the Fifth Circuit affirmed the I.C.C.'s approval of the merger of BN and Frisco railroads in *Missouri-Kansas-Texas Railroad v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981), the issues determined by the Eighth Circuit in this case were not addressed. The only other appellate decision cited by the Petitioner involving 49 U.S.C. Section 11347 or its predecessor, 49 U.S.C. Section 5(2)(f) is *Pennsylvania Railroad—Merger—New York Central Railroad*, 327 I.C.C. 475 (1966), *aff'd sub nom. Penn-Central Merger & N & W Inclusion*

Cases, 389 U.S. 486 (1968). While Petitioner tacitly admits that that appellate decision did not involve the issues herein, it draws the Court's attention to the apparent fact that one or more motor carrier subsidiaries were involved in the merger and states "yet it was never even suggested that employees of any of the motor carrier subsidiaries should receive protection pursuant to Section 5(2)(f)."[15] Surely the fact that no one suggested motor carrier subsidiary employees should receive protection in that proceeding does not mean that there is a conflict among the circuits on this issue.

Petitioner cites a number of decisions which involve the sale, acquisition or merger in trucking company transactions where railroads were not involved. Those transactions were not subject to the statutory provisions of 49 U.S.C. Section 11347 because railroads were not involved and, therefore, those decisions are not in conflict with the holding of the Eighth Circuit herein.

E. The Decision of the Eighth Circuit Was Fair and Correct.

The Eighth Circuit and the Petitioner have both cited *New York Dock Railway v. U.S.*, 609 F.2d 83 (2nd Cir. 1979) in their respective order and pleadings. That case recognizes that consolidations or mergers of carriers subject to the jurisdiction of the Interstate Commerce Act could have a devastating effect on the employees of those carriers and that employee protective conditions should be tailored to the special circumstances present in individual cases. *Id.* at 86, 92. Judges Heaney, Fagg and Collinson correctly noted the undisputed facts that following the merger, BN had two motor carrier subsidiaries

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15. Brief for Petitioner at 10.

operating under auxiliary-to-rail restrictions; that Petitioner chose to expand the certificated authority of one of its motor carrier subsidiaries at the expense of the other; that the remaining motor carrier subsidiary was still burdened by the traditional rail related restrictions; and that BN phased out FTC to make room for its other motor carrier subsidiary. The Eighth Circuit further correctly noted that the I.C.C. has long considered that a carrier and its subsidaries constitute a single transportation system with respect to transactions under Section 5 of the Act (mergers, acquisitions and sales), citing *Pennsylvania Railroad Company—Merger—New York Central Railroad*, 347 I.C.C. 536, 546 (1974). Therein, at page 547, the I.C.C. stated that the parent "has the legal right to direct the affairs of the subsidiaries and the latter have no alternative but to accept this direction, even if such were to result * * * in complete abandonment of the subsidiaries' operations or the extension of their corporate existence."[16] The Eighth Circuit viewed 49 U.S.C. Section 11347 and noted that the Congressional amendment referring to "employees who are affected by the transaction" instead of the language in former 49 U.S.C. Section 5(2)(f) which read "railroad employees affected" would seem to cover all employees of the merging companies, whether they were technical railroad employees, motor carrier employees of a subsidiary or non-carrier employees of a subsidiary.

The Eighth Circuit reasoned that it did not have to make that interpretation because the particular circumstances of this case, based on undisputed facts, indicated that Respondents are "railroad employees" within the meaning of the Act. The Eighth Circuit realized the I.C.C.'s interpretation should be given great weight but

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16. Brief for Petitioner, Appendix at 4a.

determined that the I.C.C. was clearly wrong. It noted that none of the cases cited by the I.C.C. involved motor carrier subsidiaries which exclusively operated auxiliary-to-rail services. The same cases are cited by Petitioner herein and the same reasoning applies. The determination of the Eighth Circuit was entirely correct and proper.

The Eighth Circuit further went into great detail concerning the promises and representations made by the various officials of Petitioner and Frisco, both to the I.C.C. and to their employees. Judges Heaney, Fagg and Collinson correctly noted those representations included promises that only a few employees of either company would be adversely affected by the merger and that those who were affected would be protected by standard employee protective conditions. Particularly, specific assurances were given that there would be no change in the operation or services to be provided by FTC. As previously stated, the specific representations considered by the Eighth Circuit from the I.C.C. record will not be reiterated herein but reference is drawn to Petitioner's Appendix at 8a through 13a.[17]

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17. While not determinative of the issues presented to this Court, Respondents feel compelled to reply to Footnote 36 found on page 21 of the Petition. Therein, Petitioner attempts to asperse the Eighth Circuit for referring to "isolated excerpts from the 8,000-page merger record". Petitioner was the principal party in the original I.C.C. merger proceeding and Respondents were not parties. The Eighth Circuit and the I.C.C. permitted all parties, including Petitioner, to request any portion of the voluminous record which they thought pertinent to the issues pending before the Eighth Circuit. Respondents requested all portions of the record involving the interests of the employees of which they were aware. Petitioner requested no portion of the record. Prior to the filing of this Petition, Petitioner has never suggested the representations made to the I.C.C. and to the Respondents did not, in fact, occur. It is manifestly unfair of the Petitioner to now complain that the Eighth Circuit reviewed only isolated portions of the 8,000-page merger record.

The Eighth Circuit fully understood the Congressional intent to provide a fair and equitable arrangement for the employees, and it considered the representations made to the I.C.C. and to the employees in reaching its decision. The Eighth Circuit was entirely correct in determining the legal issues in favor of the Respondent and remanding the proceeding to the I.C.C. for a computation of benefits. This ruling by the Eighth Circuit is fair and correct and does not warrant review by this Court.

F. The Court of Appeals Has the Jurisdiction and Authority to Issue the Order in This Case.

Petitioner argues the Eighth Circuit exceeded its jurisdiction by its failure to defer the issue to the I.C.C. Both the Eighth Circuit and Respondents recognize the general rule of law that an administrative agency should be given broad discretion in administering its area of expertise. If the administrative agency gave the final word in all instances, there would never be an administrative appeal. Congress specifically authorized the Court of Appeals to have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity" of all final orders of the I.C.C.[18]

The relationship of the courts and the administrative agency is not one of an adversarial relationship. "The conjunction of supervision and restraint yields a collaborative partnership between agency and court in furtherance of Congressional purpose and the interests of justice. . . . The court is in a real sense part of the total administrative process, and not a hostile stranger" to the agency.[19]

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18. 28 U.S.C. Section 2342.

19. *Greater Boston Television Corporation v. FCC*, 463 F.2d 268, 281 (D.C. Cir. 1971).

Petitioner claims that the Eighth Circuit erred by constructing a level of benefits for the Respondents which should have been left to the discretion of the I.C.C. The I.C.C. had previously structured the benefits pursuant to its 1980 Merger Order for the railroad employees of the merged system and subsidiaries pursuant to the *New York Dock* conditions.[20] The Eighth Circuit simply determined as a matter of law that under the specific circumstances of this case of first impression, the Respondents were railroad employees entitled to that level of protection. Consequently, the level of protection was structured by the I.C.C., not the Eighth Circuit.

It is the function of the courts to be the final determiner of legal issues and as this Court stated in *Neely, supra,* at page 330:

> "Petitioner's case in this court is pitched on the total lack of power in the Court of Appeals to direct entry of judgment for respondent. We have rejected that argument and, therefore, affirm."

The Eighth Circuit was totally within its authority to reverse the I.C.C. and remand for the computation of benefits. This argument on behalf of Petitioner does not warrant a grant of the Writ of Certiorari.

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20. *New York Dock Railway—Control—Brooklyn Eastern District Terminal,* 360 I.C.C. 60 (1979).

CONCLUSION

For the reasons herein stated, Respondents respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads ("AAR") respectfully moves this Court for leave to file the attached Brief *Amicus Curiae*.[1] AAR has been sparing in its previous requests for leave to submit briefs on behalf of the railroad industry, and such requests have always been granted.[2] The Court has generally permitted the participation of industry associations in cases such as this, which

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[1] Petitioner has consented to the filing of the brief. The letter signifying this consent has been filed with the Clerk. Respondents withheld consent.

[2] *See Kassel v. Consolidated Freightways Corp.*, 449 U.S. 897 (1980); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 885 (1977); *Webb v. Illinois Central Railroad*, 353 U.S. 943 (1957); *Baltimore & Ohio Railway v. Jackson*, 354 U.S. 943 (1957).

involve issues of special concern to the industry as a whole.[3]

AAR is the trade association for the nation's railroads. Its members employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of the freight revenues of all railroads in the United States.[4] AAR represents its members before courts, agencies and the U.S. Congress when matters of common concern are at issue.

The subject at issue in this case, mandatory protection pursuant to section 5(2)(f) of the Interstate Commerce Act[5] for railroad employees adversely affected by mergers, consolidations and acquisitions of control, has been an active item on AAR's agenda for nearly fifty years.[6] The decision below, which extended section 5(2)(f) to cover employees of a motor carrier subsidiary acquired in a railroad merger, is completely unprecedented and raises critical problems for AAR's member railroads because of the unanticipated financial burdens it may impose in pending transactions, and the chilling effect it may have on future transactions.

The potential financial impact of the decision is enormous. Approximately half of the nation's Class I railroads[7] have or have previously had motor carrier sub-

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[3] *See, e.g., Western Airlines v. California*, 53 U.S.L.W. 3484 (U.S. Jan. 7, 1985) (motion of Air Transport Association of America for leave to file brief *amicus curiae* granted); *Peick v. Pension Benefit Guaranty Corp.*, —— U.S. ——, 104 S. Ct. 1588 (1984) (American Trucking Associations).

[4] A listing of the membership of the Association appears at Appendix A to the attached brief.

[5] Former 49 U.S.C. § 5(2)(f) (1976), *recodified at* 49 U.S.C. § 11347 (1982).

[6] *See* notes 4-6 of the attached brief and accompanying text.

[7] A Class I railroad is a railroad with annual revenues of $50 million or more. 49 C.F.R. § 1201 (1-1) (1984).

sidiaries employing more than 8,000 workers.[8] Many of these employees have already made broad claims for labor protection based on the decision below. If as few as ten percent were determined to be entitled to labor protection benefits, the railroads' liability could exceed $100 million.[9] If most or all of these motor carrier employees should successfully assert claims to such benefits, the cost to the railroads could exceed $1 billion.

AAR is particularly well-suited to comment on the potential adverse impact of the decision below on the railroad industry.[10] At the moment, AAR is participating as *amicus curiae* in the judicial review of major policy changes by the ICC regarding the ability of railroads to acquire or establish motor carrier subsidiaries.[11] AAR's members are also involved in major ongoing mergers and sales that could be significantly affected by the decision below. AAR respectfully submits that it will be able to assist the Court in resolving this case by providing information the parties cannot provide on what the decision below means in terms of current events and future developments in the railroad industry.

Respectfully submitted,

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[8] *See* Appendix B to the attached brief.

[9] *See* note 9 of the attached brief.

[10] AAR also wishes to point out to the Court that the decision below contradicts the resolution of the same issue in related statutory contexts. *See* section I(B) of the attached brief.

[11] *See American Trucking Associations v. ICC*, Nos. 84-7545 & 84-7546 (9th Cir. filed Feb. 22, 1985).

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86 Cong. Rec. 5864 (1940)	7
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Davis, Sherwood & Jones, *An Estimate of Labor Protection Cost in Selected Railway Consolidations*, 43 I.C.C. Prac. J. 56 (1975)	17
J.R. Foster, *Boundaries Between Competition and Economic Regulation* (1983)	8
Johnson, *Going, Going, Gone!—The I.C.C.'s Regulation of Trucking Mergers*, 51 I.C.C. Prac. J. 391 (1984)	19
Miller & Lindsay, *Mergers and Acquisitions: Labor Relations Considerations*, 9 Empl. Rel. Law J. 427 (1983-84)	5
Perritt, *Ask and Ye Shall Receive: The Legislative Response to the Northeast Rail Crisis*, 28 Vill. L. Rev. 271 (1983)	17

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1313

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

RONALD L. COSBY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

INTEREST OF THE *AMICUS CURIAE* [1]

As the trade association for the nation's railroads, the Association of American Railroads ("AAR")[2] has a vital and ongoing interest in the interpretation of federal leg-

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[1] Petitioner has consented to the filing of this brief, pursuant to Rule 36 of the Supreme Court rules. Respondents withheld consent. A motion for leave to file this brief therefore accompanies the brief.

[2] AAR is a voluntary, unincorporated, nonprofit association of railroads operating in the United States, Canada and Mexico. Its member railroads employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of the freight revenues of all railroads in the United States. A listing of the membership of the Association is attached as Appendix A to this brief. The Association represents its member railroads before courts, the U.S. Congress, government agencies and administrative tribunals when matters of common concern are at issue.

islation affecting the railroad industry. The provision of the Interstate Commerce Act that mandates arrangements for the protection of railroad employees adversely affected by mergers, consolidations and acquisitions of control, section 5(2)(f),[3] has long been a matter of particular concern to AAR and its members. AAR was involved in the labor protection area even prior to the enactment of section 5(2)(f),[4] participated in the legislative process leading up to its enactment,[5] and has participated in several of the principal proceedings construing the statute.[6]

In the decision below, the Eighth Circuit departed radically from the settled interpretation of section 5(2)(f) by holding that a railroad company was required to provide labor protection benefits to employees of a motor carrier subsidiary acquired in connection with a railroad merger. This unprecedented extension of mandatory labor protection poses critical problems for AAR's member railroads because of the unanticipated financial burdens that it portends and because of its potential adverse impact on pending and future transactions that will determine the structure of the evolving surface transportation industry.

The potential financial impact of the Eighth Circuit's decision is enormous. Approximately half of the nation's

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[3] Formerly 49 U.S.C. § 5(2)(f) (1976). The provision was recodified at 49 U.S.C. § 11347 in 1978. AAR will follow the practice of petitioner and refer to this provision by its prior designation.

[4] *See* Letter of President Franklin D. Roosevelt to J.J. Pelley (AAR) and J.A. Phillips (Association of Railway Labor Executives) (March 6, 1936), *reprinted in Omnibus Transportation Bill: Hearings Before the House Committee on Interstate & Foreign Commerce*, 76th Cong., 1st Sess. 1721 (1939) (hereinafter *"House Hearings"*) (suggesting the negotiations that led to the Washington Job Protection Agreement of 1936; *see* p. 7, *infra*).

[5] *See House Hearings* at 258, 1499 (statements of Mr. R.V. Fletcher, General Counsel of AAR, and Mr. Kerr).

[6] *See, e.g., Railway Labor Executives Association v. United States*, 675 F.2d 1248 (D.C. Cir. 1982); *New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979); *Oregon Short Line Railroad—Abandonment*, 354 I.C.C. 584 (1978).

Class I railroads[7] either currently have motor carrier subsidiaries or affiliates, have recently sold or discontinued operations of such subsidiaries, or are currently seeking Interstate Commerce Commission (ICC) approval of the acquisition of such subsidiaries.[8] These motor carriers employ more than 8,000 workers and had 1984 revenues of approximately $800 million. If as few as ten percent of these 8,000 motor carrier employees were determined to be entitled to labor protection benefits, the railroads' liability could exceed $100 million.[9] If most or all of these motor carrier employees should successfully assert claims to such benefits, the cost to the railroads could exceed $1 billion.

The railroads with motor carrier interests who were parties to past mergers and those whose proposed mergers are currently pending before the ICC for approval could not have anticipated the decision below or its potential impact. Of equal importance, the risk of additional labor protection liability as a result of that decision could inhibit railroads from undertaking future mergers or acquisitions that would otherwise be justified on the grounds of operating efficiencies or cost savings. This risk is particularly acute because motor carrier employees and their union representatives have already manifested an intention in pending ICC proceedings to seek broad application of the decision below. *See* section II, *infra*. Because

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[7] A Class I railroad is a railroad with annual revenues of $50 million or more. 49 C.F.R. § 1201 (1-1) (1984).

[8] A list of these railroad companies and subsidiaries is attached as Appendix B to this brief.

[9] This estimate is based on testimony before Congress that a Teamster truck driver earned approximately $30,000 per year in 1981. *See Motor Carrier Reform Act of 1980: Oversight Hearings Before the Senate Committee on Commerce, Science, & Transportation*, 97th Cong., 1st Sess. 80 (1981). The estimate assumes application of the *New York Dock* requirement of full compensation for a period of six years following termination of employment. *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 76, *aff'd sub nom. New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979).

that decision has already cast a cloud on merger proposals and could have an unpredictable and disruptive effect on the railroad industry for years into the future, AAR strongly supports the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The mandatory protection of railroad labor in merger cases under section 5(2)(f) is an extraordinary form of income security found virtually nowhere else in the United States. This phenomenon developed under historical and legislative circumstances unique to railroad labor and was designed for narrowly defined purposes. Specifically, statutory labor protection arose in the context of efforts to promote railroad consolidation during the Depression without exacerbating already severe unemployment in the industry. The Eighth Circuit contorted section 5(2)(f) to bring within its scope employees never previously entitled to such protection.

Not only is the decision below at odds with the plain language of the Interstate Commerce Act and its history, it also conflicts with well-settled distinctions between employees of a railroad and employees of its motor carrier subsidiary for purposes of related legislation, such as labor relations and taxation statutes. The decision is contrary to and may undermine important national transportation and labor policy goals.

The adverse impact of the Eighth Circuit's decision will be particularly severe because it comes at a time of major developments in the increasingly deregulated railroad and trucking industries. In the short time since the decision below was announced, motor carrier employees have asserted broad claims for entitlement to labor protection based on the decision. Imposition of unwarranted adidtional costs on the railroad industry at this time could undermine congressional and industry efforts to restore the nation's railroads to a condition of financial soundness, and hamper the railroad industry's ability to compete effectively with other modes of transportation.

I. THE DECISION BELOW IS INCONSISTENT WITH NATIONAL TRANSPORTATION AND LABOR POLICIES

A. Mandatory Labor Protection Should Be Construed In Accordance With Its Precise And Limited Purpose

In virtually no sector of the economy other than the railroad industry are employers required, by federal statute, to compensate their employees for any adverse financial impact they may suffer as a result of economy or efficiency measures flowing from a merger, consolidation or other acquisition.[10] An acquiring company as a general matter has no legal obligation towards the employees of its predecessor.[11] Indeed, insulation of employees from adverse financial effects could negate some of the very benefits sought to be achieved by mergers, that is, efficiency improvements or cost reductions, and would therefore be counterproductive and paradoxical as economic policy.[12] Congress' decision to impose this unusual obligation on railroad companies through section 5(2)(f) was the outgrowth of pervasive federal regulation of the railroads and specific economic conditions unique to the railroad industry.

When it enacted the labor protection provision as part of the Transportation Act of 1940,[13] Congress was aware

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[10] *See* Ris, *Government Protection of Transportation Employees: Sound Policy or Costly Precedent?*, 44 J. Air L. & Com. 509 (1979); *see also* Miller & Lindsay, *Mergers and Acquisitions: Labor Relations Considerations*, 9 Empl. Rel. Law J. 427, 429 (1983-84).

[11] *See* Miller & Lindsay, *supra* note 10, at 429. Employers and employees can voluntarily create such obligations, however, through collective bargaining agreements. Roughly half the collective bargaining agreements in the country do provide some sort of income maintenance provisions, such as severance pay and supplemental unemployment benefits. *See* Labor Relations Expediter (CCH) 128 (1984).

[12] *See* Ris, *supra* note 10, at 537-40.

[13] Pub. L. No. 76-785, 54 Stat. 898 (codified in sections of 49 U.S.C. (1982)).

that it was providing railroad employees with special protection enjoyed by no workers in any other industry.[14] Such protection was needed to facilitate the passage of railroad merger legislation, which was viewed as essential to the survival of the railroad industry. The protection was intended, however, to cover only the distinct, identifiable group of workers who were employed in traditional railroad operations.

The years following World War I were a period of crisis and uncertainty for the railroad industry. The federal government's experience in supervising railroad operations during the war had confirmed that the nation's railroad system suffered from great waste and duplication of facilities.[15] Consolidation into stronger, but fewer railroads became a principal goal of national transportation policy.[16] Such consolidation, however, could also result in reductions in railroad employment, which, Congress believed, would exacerbate the already severe unemployment that the railroad industry had experienced during the Depression.[17]

Unemployed railroad workers, moreover, faced special difficulties in seeking re-employment. Railroad employees were trained for the special tasks required in railroad operations, and therefore had developed skills that were not in demand elsewhere in the economy.[18] If the number of jobs in the industry decreased because of consoli-

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[14] *See* 86 Cong. Rec. 10,189 (1940) (remarks of Rep. Wolverton).

[15] *See* Ris, *supra* note 10, at 512; 1 I.L. Sharfman, *The Interstate Commerce Commission* 172 (1931).

[16] *See United States v. Lowden*, 308 U.S. 225, 232 (1939); Sharfman, *supra* note 16, at 172-73.

[17] *See* 84 Cong. Rec. 9877 (1939) (remarks of Rep. Pierce); *House Hearings* at 213 (remarks of Mr. Harrison); at 1291 (remarks of Mr. McGrath); at 19[illegible] (remarks of Rep. Youngdahl and Mr. Gray).

[18] *See House Hearings* at 213-16 (remarks of Mr. Harrison); at 1291, 1295 (remarks of Mr. McGrath); 84 Cong. Rec. pt. 14, 3947 (1939) (extension of remarks of Sen. Truman).

dations, railroad employees could face severe long-term unemployment.

Congress sought to resolve this dilemma by adopting the central provisions of a voluntary agreement reached by railroad labor and management a few years earlier—the Washington Job Protection Agreement of 1936.[19] This unprecedented agreement, which dealt with the problem of adverse effects on employees involved in railroad mergers and consolidations, had been hailed as a remarkable achievement in addressing the "great and serious difficulties" then facing the industry.[20] The signatory labor representatives included the principal railroad crafts, but did not include the Teamsters or any representative of motor carrier employees.[21] Congress used this agreement as the model for statutory labor protection, in order to make its terms applicable to the remaining *railroads* that had not signed the agreement.[22] There is no indication Congress intended to extend its benefits to groups of workers other than those covered by the Washington Job Protection Agreement.

The legislative history confirms that Congress was concerned only about the welfare of those workers who were traditionally considered to be railroad employees, and not employees involved in motor and water transportation.[23]

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[19] A copy of the Agreement appears in *House Hearings* at 231-37.

[20] *See* 80 Cong. Rec. 7766 (1936) (remarks of Sen. Crosser).

[21] Agreement of May 1936, Washington, D.C., *House Hearings* at 237. The Teamsters Union had been in existence since 1903, and by 1935 had over 160,000 members. *See* L. Troy, *Trade Union Membership: 1837-1962* A-9 (1965).

[22] *See* 86 Cong. Rec. 10,189 (1940) (remarks of Rep. Wolverton); 86 Cong. Rec. 5864 (1940) (remarks of Rep. Lea); *House Hearings* at 216, 244 (remarks of Mr. Harrison).

[23] *See* 86 Cong. Rec. 5871 (1940) (remarks of Rep. Harrington); 86 Cong. Rec. 5881 (1940) (remarks of Rep. Wolverton); *Transportation Act of 1939: Hearings Before the Senate Committee on Interstate Commerce*, 76th Cong., 1st Sess. (1939) (hereinafter "*Senate Hearings*") at 24-25 (remarks of Mr. Harrison).

Commissioner Eastman, ICC Commissioner and former Federal Coordinator of Transportation, testified that no motor carrier employees had asked for labor protection and there was no evidence that such protection was needed.[24] Several Congressmen and witnesses observed, in fact, that a significant cause of the loss of jobs in the railroad industry was the existence of truck competition.[25] Moreover, one of the adverse effects of railroad unemployment was identified as severe strain on the Railroad Retirement fund, to which motor carrier employees did not contribute.[26]

The Eighth Circuit's ruling, therefore, not only ignores the plain language and structure of the Interstate Commerce Act, as petitioner demonstrated, but also contravenes the intent of Congress as indicated by the legislative history.[27] The courts should not permit, let alone initiate, a reinterpretation of a regulatory statute such as section 5(2)(f) that ignores its origins and purposes.[28]

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[24] *Senate Hearings* at 793 (remarks of Commissioner Eastman).

[25] 86 Cong. Rec. 5881 (1940) (remarks of Rep. Wolverton); *Senate Hearings* at 25 (remarks of Mr. Harrison).

[26] *House Hearings* at 216 (remarks of Mr. Harrison); *see also* section B, *infra*.

[27] Moreover, motor carrier employees have had ample opportunity to seek legislative parity with railroad employees and have not succeeded in gaining appreciable additional labor protection. For example, the Motor Carrier Act of 1980 established a job reference service in the Department of Labor, but an attempt by the Teamsters to create a federally-financed labor protection scheme providing benefits analogous to railroad labor protection was rejected. *See* 126 Cong. Rec. H5407-10 (June 19, 1980). Requests for additional labor protection have also been made during the Motor Carrier Act oversight hearings, but none of these requests has been seriously pursued by Congress. *See Oversight of the Motor Carrier Act of 1980: Hearing before the Senate Committee on Commerce, Science, & Transportation*, 98th Cong., 1st Sess. 50-52 (1983).

[28] *See Chemical Manufacturers Association v. Natural Resources Defense Council*, 53 U.S.L.W. 4193 (U.S. Feb. 27, 1985); *see generally* J.R. Foster, *Boundaries Between Competition and Economic Regulation* 17 (1983); S. Breyer, *Regulation and Its Reform* 191 (1982).

B. The Distinction Between Railroad Employees And Employees Of A Railroad's Motor Carrier Subsidiary Is A Necessary Element In A Balanced Statutory Scheme

The Eighth Circuit's holding that the employees of a motor carrier subsidiary may obtain the unique labor protection guarantees extended to railroad employees by § 5(2)(f) is inconsistent with the distinction drawn between railroad employees and motor carrier employees in related statutory contexts. In the areas of labor relations and payroll taxation for retirement and unemployment, Congress has consistently singled out railroad employees for unique statutory treatment. Thus, railroad employees are covered by the Railway Labor Act,[29] whereas motor carrier employees, like other workers, fall under the National Labor Relations Act.[30] The Railroad Retirement Tax Act[31] and the Railroad Unemployment Insurance Act[32] govern payroll taxes for railroad employees, whereas motor carriers, like other companies, are simply covered by the Federal Insurance Contributions Act[33] and the Federal Unemployment Tax Act.[34] These rail and non-rail statutes are mutually exclusive, and result in a distinct mix of benefits and burdens for railroad employees not applicable to any other employees.

Significantly, in each of these areas it has been established that a motor carrier subsidiary of a railroad must be treated as a motor carrier, not as a railroad. For example, the employees of a motor carrier subsidiary that operates closely with its parent railroad in "piggy-back" operations and pickup and delivery service are nonetheless motor carrier employees subject to the National La-

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[29] 45 U.S.C. §§ 151-188 (1982).

[30] 29 U.S.C. §§ 151-169 (1982).

[31] 26 U.S.C. §§ 3201-3233 (1982).

[32] 45 U.S.C. §§ 351-367 (1982).

[33] 26 U.S.C. §§ 3101-3126 (1982).

[34] 26 U.S.C. §§ 3301-3311 (1982).

bor Relations Act, and not railway employees.[35] Amendments to the Railway Labor Act proposed in 1934 would have broadened the scope of the Act to include all "operations which form an integral part of railroad transportation." [36] After hearing testimony raising concern about the effect of such a provision on motor carrier subsidiaries,[37] Congress enacted revised language providing that the Act would not apply to "trucking service" performed by subsidiaries.[38]

Interpreting similar language in the Railroad Retirement Tax Act, the Claims Court has made clear that a railroad's motor carrier subsidiary is not a railroad employer for purposes of the railroad tax acts. *Missouri Pacific Truck Lines v. United States*, 3 Cl.Ct. 14 (1983), *aff'd*, 736 F.2d 706 (Fed. Cir. 1984) (per curiam). In the course of an exhaustive review of the statutory landscape, including consideration of non-tax railroad and motor carrier legislation, the Claims Court held that the existence of extensive motor carrier intermodal and substitute-for-rail operations did not alter the reality that the motor carrier provided trucking service and was not a railroad employer. *See* 3 Cl.Ct. at 17-18, 21, 27.

In the same fashion, the Interstate Commerce Act distinguishes between the labor protection guaranteed to railroad employees [39] and the labor protection available, as a

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[35] *See Truck Drivers, Chauffeurs & Helpers Local Union No. 100*, 5 N.M.B. 298 (1975); *New York Central Transport Co. v. Schwartz*, NLRB Dec. (CCH) ¶ 11,653 (1962).

[36] *See To Amend The Railway Labor Act: Hearings Before the Senate Committee on Interstate Commerce*, 73rd Cong., 2d Sess. 10 (1934) (remarks of Commissioner Eastman).

[37] *See id.* at 56-59 (remarks of Mr. Clement); *Railway Labor Act Amendments: Hearings Before the House Committee on Interstate & Foreign Commerce*, 73rd Cong., 2d Sess. 19, 124 (1934) (remarks of Commissioner Eastman and Mr. Clement).

[38] *See* Railway Labor Act, Pub. L. No. 73-442, § 1, 48 Stat. 1185, 1186 (1934).

[39] Former section 5(2)(f), *codified at* 49 U.S.C. § 11347 (1982).

matter of the ICC's discretion, to employees of other companies, including motor and water carriers.[40] Consistent with the law that has developed under the related labor and tax statutes, the ICC has long held that individual workers do not become railroad employees entitled to mandatory protection simply because their employer is owned by a railroad or coordinates its services with railroad operations. *See* Petition for Certiorari at 11-13. The decision below not only reverses the Commission's longstanding interpretation of the Interstate Commerce Act but also upsets the logic and fairness of the congressional scheme by providing mandatory six-year labor protection to a group of employees who are not otherwise subject to the web of railway legislation.

As noted above, the tax and labor statutes provide railroad employees with a distinct mix of burdens and benefits. For example, by participating in the railroad retirement system, railroad employees bear significantly higher taxes than those imposed on motor carrier employees through the social security system.[41] Railroad employees also face important limitations on the full exercise of their rights in the labor relations area—most notably the right to strike. Because of the perceived national interest in preventing any interruption in rail service, railway employees are completely precluded from

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[40] Former section 5(2)(c), *codified at* 49 U.S.C. § 11344(b)(1) (1982).

[41] *See* Adam & McKenna, *Railroad Retirement Taxes v. Social Security Taxes: Railroad Affiliates and Intermodal Operations*, in *Railroad Tax Workshop* 141, 144-47 (R. Molloy ed. 1981).

It is also noteworthy that at approximately the same time Congress was formulating section 5(2)(f), it was also strengthening the federal role in unemployment compensation through amendments to the Social Security Act. *See* R. Stevens, *Statutory History of the United States: Income Security* 185, 230-32, 246, 251-52 (1970). To use the jargon of a later era, Congress provided a "safety net" for employees, such as motor carrier employees, who were not included in a special system such as the railroad retirement system.

striking over certain kinds of disputes,[42] and may only strike in other disputes after exhaustion of elaborate mediation and intervention procedures involving special administrative bodies established for this purpose.[43] The National Labor Relations Act imposes no such restrictions on motor carrier employees.

Through the entire body of legislation concerning railroad employees, Congress sought to achieve a balance between the interests of railroads, their employees and the general public—a balance that was different from that struck for other workers in the economy. The Eighth Circuit's decision purports to carve out a specific benefit—mandatory labor protection—without regard to the remainder of the federal railway labor scheme. It thereby contradicts the resolution of the same issue in related statutory contexts and introduces an element of imbalance and unfairness that will surely engender unnecessary litigation and controversy.

II. THE DECISION BELOW WILL DISRUPT SIGNIFICANT DEVELOPMENTS IN BOTH THE RAIL AND TRUCKING INDUSTRIES IN THE ERA OF DEREGULATION

The decision below threatens to have a disruptive and adverse financial impact on the railroad industry in several ways. Two-thirds of the railroad companies with ownership interest in or affiliation with motor carriers are the product of mergers. The ICC studied and approved each of those mergers, as it did in the case of the BN-Frisco merger underlying the present dispute, and imposed mandatory protection of railroad employees as a condition of its approval of each merger. The decision below is likely to create new claims, like the ones

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[42] 45 U.S.C. §§ 153(i) & (m) (1982). *See Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad*, 353 U.S. 30, 35-37 (1957).

[43] 45 U.S.C. §§ 156, 160 (1982). *See Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway*, 384 U.S. 238, 243-44 (1966).

raised by the Respondents, that may require additional proceedings to interpret the scope of the original orders.

The adverse impact of the decision below is particularly pronounced because it comes at a time of accelerating changes in the structure of the nation's surface transportation industries. These changes are reflected by: (1) the ICC's recent elimination of barriers to railroad acquisition of motor carriers and other non-rail transportation companies; (2) the current wave of major railroad consolidations; and (3) the increasing competitiveness of and ease of entry into the motor carrier industry.

A. Elimination Of Barriers To Railroad Acquisition Of Motor Carriers

In the aftermath of the recent railroad and motor carrier deregulation statutes, the ICC has made major policy changes that make it easier for railroads to acquire or establish motor carrier subsidiaries.[44] Under this new regime, railroad companies are actively seeking opportunities for ownership of companies in other transportation modes, in order to provide shippers with a full range of transportation services. The decision below may well frustrate these efforts by imposing a new economic burden on such transactions.

For example, the Norfolk Southern Corporation is currently seeking ICC authorization to acquire North American Van Lines ("NAVL").[45] The decision below has significantly complicated that proceeding by creating a new issue—whether the NAVL employees are entitled to

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[44] *See Acquisition of Motor Carriers by Railroads*, —— I.C.C.2d —— (July 20, 1984), *appeal pending sub nom. American Trucking Associations v. ICC*, Nos. 84-7545, 84-7546 (9th Cir. filed Aug. 20, 1984); *Applications for Motor Carrier Operating Authority By Railroads & Rail Affiliates*, 132 M.C.C. 978 (1982), *aff'd sub nom. American Trucking Associations v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984).

[45] *Norfolk Southern Corp.-Control-North American Van Lines*, Finance Docket No. 30500 (I.C.C. filed Aug. 16, 1984).

mandatory labor protection under section 5(2)(f). The Teamster filings in that case indicate the motor carrier employees are basing their claim for such protection entirely on a broad reading of the Eighth Circuit's decision.[46] Extension of mandatory labor protection to NAVL's 2,000 employees in connection with the acquisition would be extremely burdensome.[47]

The Commission's previous restrictions on railroad acquisition of motor carriers were criticized as having a "chilling effect" on the development of innovative and efficient transportation services.[48] Relaxing those barriers, the Commission observed, would benefit the shipping public by allowing free market forces to determine the allocation of rail and motor carrier services.[49] The ICC's new policy of eliminating restraints on railroad ownership of motor carriers could well be frustrated, how-

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[46] *See* Opening Brief of the Regular Common Carrier Conference and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in Opposition to Application at 56-59 (January 17, 1985). In particular, the Teamsters rely heavily on the Eighth Circuit's analysis of the effect of the 1978 recodification of the Interstate Commerce Act on the meaning of the term "employee" in section 5(2)(f). That analysis, however, was plain legal error. *See* Petition for Writ of Certiorari at 11 n.18.

[47] In contrast, in a case decided just as the decision below was announced, the Interstate Commerce Commission approved the acquisition of a major water carrier by a railroad holding company, but denied labor protection for the water carrier's employees. As in the *NAVL* case, the economic costs of any additional labor protection for non-rail employees could have affected the economics of the entire transaction, since the water carrier involved has some 2,500 employees. *CSX Corp.-Control-American Commercial Lines, Inc.*, Finance Docket No. 30300, slip op. at 63 (decided Aug. 27, 1984; served Sept. 7, 1984), *appeal pending sub nom. Crouse Corp. v. ICC*, Nos. 84-3743, 84-3753 (6th Cir. filed Sept. 10, 1984).

[48] *See American Trucking Associations*, 722 F.2d at 1251.

[49] "The ability of a transportation company to provide the consumer with [a] broad range of choices is certainly consistent with the aim of the Interstate Commerce Act to ensure that the best possible surface transportation system is provided to the public." *Acquisition of Motor Carriers by Railroads*, slip op. at 15.

ever, if the chilling effect of the old restrictions is replaced by new, equally burdensome financial liabilities in the form of mandatory income guarantees.

B. Pending Railroad Mergers And Sales

Since the 1940's the nation has experienced several waves of railroad consolidations, as the industry attempted to restructure itself to meet the needs of a changing marketplace. After a lull in merger activity following the Penn Central bankruptcy in 1970, the railroads are once again turning toward consolidation as a means of positioning themselves to compete with other modes of transportation in a deregulatory environment. Indeed, the first significant transaction in the most recent wave of consolidations was the BN-Frisco merger that gave rise to this case.[50] The industry assessment of the economic benefits of mergers will necessarily be influenced by the Eighth Circuit's unwarranted extension of mandatory labor protection to motor carrier subsidiaries. The potentially disruptive effect of the decision below is exemplified in two prominent, ongoing matters—the proposed merger of the Santa Fe and Southern Pacific railroads, and the proposed sale of Conrail to the Norfolk Southern Corporation.

The proposed Santa Fe-Southern Pacific merger is presently pending before the ICC.[51] Both Santa Fe and Southern Pacific either currently own or have recently sold motor carrier subsidiaries. Indeed, these subsidiaries are among the largest rail-controlled motor carriers in terms of numbers of persons employed. The Teamsters have already made sweeping claims on behalf of the

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[50] Other recent consolidations include the Union Pacific-Missouri Pacific-Western Pacific merger, the formation of a unified northeastern railroad system by the Guilford Transportation Company, and mergers undertaken by the CSX and Norfolk Southern Corporations.

[51] *Santa Fe Southern Pacific Corp.-Control-Southern Pacific Transportation Co.*, Finance Docket No. 30400 (I.C.C. filed Nov. 22, 1983).

motor carrier employees in that proceeding, and assert that the decision below extends not only to motor carrier subsidiaries, but to other non-rail subsidiaries as well.[52] While the ICC has not yet ruled on the merits of the Teamsters claim, it noted in a preliminary order that the Eighth Circuit had interpreted section 5(2)(f) to have "broad application" which could extend to the employees of the railroads' motor carrier subsidiaries.[53] In view of the size of the motor carriers involved and the number of employees potentially affected, the imposition of *New York Dock* conditions would be a significant burden on the merging railroads.

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[52] *See* Transcript of Hearing at 9720-26 (Jan. 29, 1985). This interpretation evidently stems from the Eighth Circuit's observation that the FTC operations were "intimately tied to the railroad's main transportation function." *Cosby v. ICC*, 741 F.2d 1077, 1081 (8th Cir. 1984).

Another group of motor carrier employees also fastened on the "intimately tied" language, in order to raise labor protection claims in the ongoing Milwaukee Road reorganization. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.-Reorganization-Acquisition by Grand Trunk Corp.*, Finance Docket No. 28640 (Sub-No. 9) (I.C.C. filed Aug. 5, 1982). On November 21, 1984, seventy employees of the Milwaukee motor carrier subsidiary intervened in the proceeding seeking mandatory labor protective conditions. *See* Position Paper of Seventy (70) Individual Employees of Milwaukee Motor Transportation Company Seeking Employee Protective Conditions, Finance Docket No. 28640 (Sub-No. 9). The Commission rejected the MMT employees' claims. *See* —— I.C.C. 2d ——, slip op. at 16-17 (served Jan. 11, 1985). On appeal, the Reorganization Court avoided the *Cosby* problem by deciding that motor carrier employees are not railroad employees for purposes of the Milwaukee Railroad Restructuring Act, Pub. L. No. 96-101, 93 Stat. 736 (1979), which defines employees as those who worked "on a line of . . . railroad." 45 U.S.C. § 902(4)(A) (1982). *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, No. 77B8999, Order No. 809 at 8 (N.D. Ill. Feb. 19, 1985). This narrow ruling, of course, will not deter continued claims under the Interstate Commerce Act.

[53] *Santa Fe Southern Pacific Corp.-Control-Southern Pacific Transportation Co.*, Finance Docket No. 30400 (I.C.C. served November 30, 1984).

In the case of Conrail, the decision below introduces a further complication into a proposed sale recommended by the Department of Transportation as an ultimate solution to the decades-old railroad crisis in the Northeast.[54] The Conrail program has consumed massive federal funds, and its transfer back to the private sector will perhaps be the largest government divestiture of a business operation in this century. Conrail's motor carrier subsidiary, Pennsylvania Truck Lines, is the second largest rail-controlled motor carrier in the nation, with some 1,000 employees.[55] Norfolk Southern, the potential purchaser, has offered standard labor protection to Conrail's rail employees, and the bill transmitted to Congress by the DOT to provide for the transfer of ownership requires *New York Dock* protection for employees of Conrail or its rail affiliates.[56] Before the decision below, there was no basis even to suggest that the employees of Pennsylvania Truck Lines were entitled to *New York Dock* conditions. After the Eighth Circuit's decision, however, these employees are in a position to make claims that could enormously complicate the legislative process required to accomplish the proposed sale.

Mandatory labor protection imposed in merger proceedings has been recognized as a substantial and burdensome cost to railroads.[57] Judge Friendly, writing for the Special Court overseeing reorganization of the Penn Central railroad, noted that "[i]t is common knowledge

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[54] Conrail was created by Congress in 1973, as a means of preserving rail service in the Northeast in the wake of the Penn Central bankruptcy. *See* Perritt, *Ask and Ye Shall Receive: The Legislative Response to the Northeast Rail Crisis*, 28 Vill. L. Rev. 271, 297-301 (1983).

[55] *See* Appendix B.

[56] *See* H.R. 1449, 99th Cong., 1st Sess., 131 Cong. Rec. H1100 (March 6, 1985); S.638, 99th Cong., 1st Sess., 131 Cong. Rec. S2727 (March 7, 1985).

[57] *See* Davis, Sherwood & Jones, *An Estimate of Labor Protection Cost in Selected Railway Consolidations*, 43 I.C.C. Prac. J. 56, 63 (1975).

that one cause of the Penn Central debacle was the cost of complying with the protective conditions assumed in order to secure the acquiescence of labor organizations to the merger between the Pennsylvania and the New York Central." [58] Within two years of that merger, Penn Central was in bankruptcy and Congress was forced to set up Conrail to avoid a total loss of rail service in part of the country. As a further response to that rail crisis, Congress enacted several major railroad statutes, principally the 4-R Act [59] and the Staggers Act,[60] intended to improve the railroads' ability to achieve and maintain adequate revenues. This Court should not allow an unwarranted expansion of financial liability under section 5(2)(f) that could undermine congressional efforts to assure the financial recovery of the railroads.

C. Deregulation And Competition In The Motor Carrier Industry

The motor carrier industry has undergone substantial deregulation since enactment of the Motor Carrier Act of 1980.[61] Testimony during recent oversight hearings indicates deregulation has had a significant positive effect on the trucking industry and that its overall financial condition is improving.[62] Relaxation of entry barriers and other reforms have resulted in a dramatically more

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[58] *In re Penn Central Transportation Co.*, 384 F. Supp. 895, 910 n.20 (Regional Rail Reorg. Ct. 1974).

[59] Railway Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified in sections of 45 U.S.C. (1982)).

[60] Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in sections of 49 U.S.C. (1982)).

[61] Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in sections of 49 U.S.C. (1982)). *See generally Oversight of the Motor Carrier Act of 1980: Hearing Before the Senate Committee on Commerce, Science, & Transportation*, 98th Cong., 2d Sess. (1984) (hereinafter *"Senate Oversight Hearing"*) at 13 (statement of Commissioner Gradison).

[62] *Senate Oversight Hearing* at 10, 147 (statements of I.C.C. and D.O.T.).

competitive, efficient, and dynamic industry. Certainly a number of companies have been unable to compete effectively and have dropped out.[63] Indeed, as this case demonstrates, a number of such unsuccessful motor carriers have been railroad subsidiaries.[64] At the same time, however, entry of new carriers into the motor carrier industry since 1980 has been substantial. The number of trucking firms nearly doubled in the first three years of deregulation.[65] As a result, overall employment in the industry has increased to near-record levels.[66]

In this highly competitive environment, the companies that succeed are the ones that are efficient, creative and flexible in responding to shippers' needs, and able to implement new marketing strategies quickly.[67] However, in the case of any business decision that potentially affects a motor carrier's labor force, the decision below imposes costs on companies affiliated with railroads that non-rail affiliated companies will not incur. This arbitrary imposition of costs unfairly handicaps rail-affiliated motor carriers in competing on the merits with other trucking companies. Such a result is inconsistent with the goals of both trucking and railroad deregulation.

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[63] *See Senate Oversight Hearing* at 10, 75.

[64] *See* Appendix B.

[65] *See Senate Oversight Hearing* at 147; *see also* Johnson, *Going, Going, Gone!—The ICC's Regulation of Trucking Mergers*, 51 I.C.C. Prac. J. 391, 391-92 (1984).

This significant amount of new entry also supports the Commission's traditional justification for imposing minimal labor protection in motor carrier cases on the ground that new employers are more likely to appear in the motor carrier industry than in the railroad industry. *See* Petition for Writ of Certiorari at 13.

[66] *Senate Oversight Hearing* at 89-90, 95 (Exhibit 4).

[67] *Senate Oversight Hearing* at 73-74; *Oversight of the Motor Carrier Act of 1980: Hearings Before the House Subcommittee on Surface Transportation of the Committee on Public Works & Transportation*, 97th Cong., 1st Sess. 549-552 (1981) (statement of John Fowler, General Counsel (D.O.T.)).

CONCLUSION

Since its enactment, the critical disputes arising under section 5(2)(f) have been resolved only when this Court addressed the issues.[68] The Court has never addressed the scope of employees entitled to protection, however, and has not revisited the field of mandatory labor protection since the major transportation deregulatory statutes of recent years. AAR respectfully submits that this case is a timely and appropriate vehicle for the Court to resolve an important controversy concerning the scope of mandatory labor protection, and to prevent undesirable and needless disputes and turmoil between labor and management at a critical period for the surface transportation industry.

Respectfully submitted,

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March 18, 1985

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[68] *See Norfolk & Western Railroad v. Nemitz*, 404 U.S. 37 (1971); *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961); *Railway Labor Executives Association v. United States*, 339 U.S. 142 (1950); *ICC v. Railway Labor Executives Association*, 315 U.S. 373 (1942).

APPENDICES

APPENDIX A

MEMBERS OF THE ASSOCIATION OF AMERICAN RAILROADS

FULL MEMBER ROADS (U.S. LINES)

Akron, Canton & Youngstown Railroad Company

Alton & Southern Railway Company

Atchison, Topeka & Santa Fe Railway Company

Baltimore & Ohio Railroad Company

- Curtis Bay Railroad Company
- Staten Island Railroad Corporation

Baltimore & Ohio Chicago Terminal Railroad Company

Bangor & Aroostook Railroad Company

- Van Buren Bridge Railroad

Belt Railway Company of Chicago

Bessemer & Lake Erie Railroad Company

Birmingham Southern Railroad Company

Burlington Northern Railroad Company

[Canadian Pacific Limited—lines operated in U.S.]

- Canadian Pacific lines in Maine
- Canadian Pacific lines in Vermont

Chesapeake & Ohio Railway Company

- Covington & Cincinnati Elevator Railroad & Transfer & Bridge Company

Chicago & Illinois Midland Railway Company

Chicago & North Western Transportation Company

Chicago & Western Indiana Railroad Company

Chicago, Milwaukee, St. Paul & Pacific Railroad Company

Colorado & Southern Railway

Consolidated Rail Corporation

Denver & Rio Grande Western Railroad Company

Detroit & Mackinac Railway Company

Duluth, Missabe & Iron Range Railway Company

Elgin, Joliet & Eastern Railway Company

Fort Worth & Denver Railway

Galveston, Houston & Henderson Railroad Company

[Grand Trunk Corporation—and other lines in the U.S. indirectly controlled by the Canadian National Railways]:

- Grand Trunk Western Railroad Company
  - Detroit, Toledo & Ironton Railroad Company
- Central Vermont Railway, Inc.
- Duluth, Winnipeg & Pacific Railway Company
- [Canadian National Railways]:
  - Lines in Michigan
  - Lines in New England
  - Lines in New York
  - Lines in Vermont

Green Bay & Western Railroad Company

Houston Belt & Terminal Railway Company

Illinois Central Gulf Railroad Company

- Chicago & Illinois Western Railroad Company
- Waterloo Railroad

Kansas City Southern Railway Company

- Arkansas & Western Railway Company
- Fort Smith & Van Buren Railway Company
- Kansas & Missouri Railway & Terminal Railroad

Kentucky & Indiana Terminal Railroad

Lake Superior & Ishpeming Railroad Company

Lake Terminal Railroad Company

Louisiana & Arkansas Railway Company

McCloud River Railroad Company

McKeesport Connecting Railroad Company

Maine Central Railroad Company

Portland Terminal Company

Manufacturers Railway Company

Metro North Commuter Railroad Company

Missouri-Kansas-Texas Railroad Company including

Beaver, Meade & Englewood Railroad Company

Missouri Pacific Railroad Company

Brownsville & Matamoros Bridge Terminal Company

Chicago Heights Terminal Transfer Company

Doniphan, Kensett & Searcy Railway Company

Weatherford, Mineral Wells and Northwestern Railway Company

National Railroad Passenger Corporation (AMTRAK)

Newburgh & South Shore Railway Company

Norfolk & Western Railway Company

Chesapeake Western Railway Company

Lake Erie & Fort Wayne Railroad Company

Lorain & Western Virginia Railway Company

New Jersey, Indiana & Illinois Railroad Company

Norfolk, Franklin & Danville Railway Company

Peoria & Pekin Union Railroad Company

Pittsburg & Shawmut Railroad Company

Pittsburgh & Lake Erie Railroad Company

Montour Railroad Company

Youngstown & Southern Railway Company

Prescott & Northwestern Railroad Company

Richmond, Fredericksburg & Potomac Railroad Company

St. Louis Southwestern Railway Company

Seaboard System Railroad, Inc.

- Gainesville Midland Railroad Company

Soo Line Railroad Company

- Sault Ste. Bridge Company

Southern Pacific Transportation Company

- Holton Inter-Urban Railway Company
- Northwestern Pacific Railroad Company
- Petaluma & Santa Rosa Railroad Company
- Visalia Electric Railroad Company

Southern Railway System

- Alabama Great Southern Railroad Company
- Algers, Winslow & Western Railway Company
- Atlantic & East Carolina Railway Company
- Camp Lejeune Railway Company
- Carolina and Northwestern Railway Company
- Central of Georgia Railroad Company
- Cincinnati, New Orleans & Texas Pacific Railway Company
- Georgia Northern Railway Company
- Georgia Southern & Florida Railway Company
- Interstate Railroad Company
- Live Oak, Perry & South Georgia Railway Company
- Louisiana Southern Railway Company
- State University Railroad Company
- Tennessee, Alabama & Georgia Railway Company
- Tennessee Railway Company

Texas Mexican Railway Company

Union Pacific Railroad Company
Spokane International Railroad Company
Mt. Hood Railway Company
Union Railroad Company (Pittsburgh)
Vermont Railway, Inc.
Western Maryland Railway Company
Western Pacific Railroad Company
Sacramento Northern Railway Company
Tidewater Southern Railway Company
Western Railway of Alabama
Atlanta & West Point Rail Road Company
Winston-Salem Southbound Railway
High Point, Thomasville & Dentor Railroad

SPECIAL CANADIAN AND MEXICAN MEMBER ROADS

CANADIAN LINES (in Canada)
Algoma Central Railway
British Columbia Hydro & Power Authority
British Columbia Railway
Canadian National Railways
Canadian Pacific Limited
Ontario Northland Railway
Toronto, Hamilton & Buffalo Railway
White Pass & Yukon Corp. Ltd.
MEXICAN LINES (in Mexico)
Chihuahua Pacific Railway Company
[Direction General de Ferrocarriles en Operacion]:
Ferrocarril Sonora-Baja California, S.A. de C.V.
Ferrocarriles Unidos del Sureste, S.A. de C.V.
Ferrocarril del Pacifico, S.A. de C.V.
National Railways of Mexico

ASSOCIATE MEMBERS

Alaska Railroad

Aliquippa & Southern Railroad Company

American Refrigerator Transit Company

Apalachicola Northern Railroad Company

Belfast & Moosehead Lake Railroad Company

Boston & Maine Corporation
Springfield Terminal Railway

California Western Railroad

Centromen Puru Incorporated

Chestnut Ridge Railway

Chicago Short Line Railway Company

Chicago South Shore & South Bend Railroad

Chicago, West Pullman & Southern Railroad Company

Chilean State Railways (CHILE)

Cities Service Company Railroad

Cliffs Western Australian Mining Co. Pty Ltd
(AUSTRALIA)

Colorado & Wyoming Railway Company

Cuyahoga Valley Railway Company

Dardenelle & Russellville Railroad Company

Delaware & Hudson Railway Company
Greenwich & Johnsville Railway Company

Delray Connecting Railway Company

Devco Railway (Cape Breton Dev. Corp.—Coal Div.)
(CANADA)

Duluth & Northwestern Railroad Company

East Erie Commercial Railroad

East Jersey Railroad & Terminal Company

East St. Louis Junction Railroad Company
Empresa Minera Del Centro Del Peru Railways (PERU)
Essex Terminal Railway (CANADA)
Fepasa-Ferrovia Paulista (BRAZIL)
Fruit Growers Express Company
Genesee & Wyoming Railroad Company
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company
Hamersley Iron Pty Ltd. (WESTERN AUSTRALIA)
Hartford & Slocomb Railroad Company
Hillsdale County Railway Company, Inc.
India, Gov't. of: Ministry of Railways (INDIA)
Japanese National Railways (JAPAN)
Korean National Railroad (KOREA)
LaSalle & Bureau County Railroad Company
Lenawee County Railroad Company, Inc.
Long Island Rail Road Company
Louisiana & North West Railroad Company
Manufacturers' Junction Railway Company
Maryland & Pennsylvania Railroad Company
Metro North Commuter Railroad Company
Michigan Northern Railway Company, Inc.
Middletown & Hummelstown Railroad Company
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Company
New Orleans Public Belt Railroad

Northeast Illinois Railroad Corporation

Pacific Fruit Express Company

Pearl River Valley Railroad Company

Pickens Railroad-National Railway Utilization Corp.

Port Authority of New York & New Jersey (The)

Providence & Worcester Company

Public Transport Commission of New South Wales (AUSTRALIA)

Rede Ferroviaria Federal S.A. (BRAZIL)

River Terminal Railway Company

Roberval & Saguenay Railway Company (CANADA)

Roscoe, Snyder & Pacific Railway Company

San Diego & Arizona Eastern Transportation Company

Sierra Railroad Company

Somerset Railroad Corporation

South African Railways (REPUBLIC OF SOUTH AFRICA)

Southern Indiana Railway, Inc.

Spanish National Railways (RNFE) (SPAIN)

Taiwan Railway Administration (REPUBLIC OF CHINA)

Texas & Northern Railway Company

Upper Merion & Plymouth Railroad Company

Victoria A Minas Railway (BRAZIL)

Wabush Lake Railway Ltd. (CANADA)

Warwick Railway Company

Washington Terminal Company

Yancey Railroad Company

APPENDIX B

RAILROADS AND MOTOR CARRIER SUBSIDIARIES

I. Class I Railroad Companies With Current Ownership Interest In Motor Carriers [1]

Railroad	Motor Carrier	Number of Motor Carrier Employees [2]
Chesapeake & Ohio Ry.	Chessie Motor Express	149
Consolidated Rail Corp.	Pennsylvania Truck Lines	1,000
Florida East Coast Ry.	Florida Express Carrier	[3]
	Florida East Coast Highway Dispatch	185
Illinois Central Gulf	Gulf Transport Company	170
Seaboard System R.R.	Seacoast Transp. Co.	128
Chicago, Milw. St. P.	Milwaukee Motor Transport	260
Denver & Rio Grande Western R.R.	Rio Grande Motor Way	40
Kansas City Southern	Louisiana, Ark. & Tex. Transport Co.	46
	Landa Motor Lines	41
	KCS Transport	29
Missouri-Kansas-Texas	Katy Transp. Co.	71
Missouri Pacific R.R.	Missouri Pacific Truck Lines	450
Southern Pacific	Pacific Motor Trucking	1,641
	Pacific Motor Transport	23
	Louis Heller, Inc.	(presently inactive)
Union Pacific R.R.	Union Pacific Motor Freight	257
Western Pacific R.R.	WPX Freight System	185
	TOTAL	4,675

[1] Source: AAR survey of membership, and annual reports of Class I Railroads (Form R-1), through 1983.

[2] Employee counts taken from Standard & Poor's Register of Corporations (1985), and from AAR survey of members. These figures do not include owner-operators providing occasional service under contract.

[3] Not available.

II. Motor Carrier Subsidiaries Sold Or Terminated By Class I Railroad Companies Since January 1, 1980 [1]

Railroad	Motor Carrier	Number of Motor Carrier Employees [2]
Burlington Northern R.R.	BN Transport	708
	Federal Transport	39
	Frisco Transp. Co.	162
Atchison, Topeka & S.F.	Santa Fe Trails Transp.	558
Southern Ry. Co.	Southern Region Motor Transp.	37
	TOTAL	1,504

[1] Source: AAR survey of membership.

[2] Source: Standard & Poor's Register of Corporations (1985), and AAR survey of membership.

III. Pending Applications For Acquisitions Of Motor Carriers By Railroads

Railroad	Motor Carrier	Number of Motor Carrier Employees
Norfolk Southern	North American Van Lines	2,400
	TOTAL Motor Carrier Employees in Tables I, II and III	8,579

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No. 84-1313

In the Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

RONALD K. COSBY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

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Come now Respondents and respectfully object to the Motion for Leave to File a Brief *Amicus Curiae* by the Association of American Railroads (hereinafter "AAR") in support of the Petition for a Writ of Certiorari filed by Burlington Northern Railroad Company (hereinafter "Petitioner" or "BN") pursuant to Rule 36.3 and respectfully state as follows:

SUMMARY OF OBJECTION

AAR filed its Motion in support of the Petition and Motion for Leave to File a Brief *Amicus Curiae* on March 18, 1985. Rule 36.1 requires a motion to be filed prior to the brief in opposition to the Petition for Certiorari. In this instance, the brief in opposition was filed by Respondents on March 15, 1985, therefore, AAR's motion is untimely.

Rule 36.3 further requires a motion for leave to file a brief *Amicus Curiae* to concisely "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case." AAR fails to set forth the facts or questions of law which it believes may not have been presented by the Petitioner nor any reasons for believing that they will not be adequately presented by the Petitioner. The Petitioner is a giant in the rail industry and has the financial ability and competent counsel necessary to present all issues to this Court. AAR is a trade association of railroads of which BN is one of the larger members. In the Respondents' view and after reading the proposed brief of AAR, no issues of fact or law are raised in AAR's motion or brief which are substantially different from what has been stated by Petitioner.

AAR has omitted one very critical factor from its allegations of national transportation importance. That critical factor is the existence of the "ancillary or supplemental to rail service" restriction contained in the operating authority of Respondents' ex-employer. The Eighth Circuit's Order relied heavily on the existence of that restriction. Consequently, the national implications alleged

by AAR do not exist. AAR should know the Interstate Commerce Commission (hereinafter "I.C.C.") has issued a Decision in another rail merger proceeding since the *Cosby* decision was rendered by the Eighth Circuit, wherein employee protection for employees of motor carrier subsidiaries was requested. The I.C.C. denied that request on the basis of the non-existence of the restriction found in this case and specifically distinguished this case from others where no such restriction exists. A copy of the pertinent portions of that order relating to employee protective conditions is attached hereto as Appendix 1.

Respondents withheld consent to the filing of an *Amicus Curiae* brief by AAR for these reasons and ask the Court to deny the motion of AAR.

ARGUMENT IN SUPPORT OF OBJECTION

Rule 36.1 provides that a motion for leave to file an *Amicus Curiae* brief when consent has been refused is not favored. Respondents refused to consent to *Amicus Curiae* intervention by AAR for several reasons. First, in Respondents' opinion, the request was not timely made. The Eighth Circuit Order from which the Petitioner seeks review was issued August 22, 1984. Petitioner requested and was granted an extension of time for filing its Petition over Respondents' objections. AAR sought consent a week before Respondents' brief was due. By that time, the Petition had been filed and Respondents' brief in opposition to the Petition was virtually completed. The Petitioner is one of the largest members of AAR and Respondents viewed this last minute attempt as a dilatory tactic.

Second, AAR is a trade association of the railroad industry and Petitioner is one of its largest members. As

such, Respondents believe AAR is simply the alter ego of the Petitioner and its arguments will simply restate matters argued by Petitioner.

Notwithstanding the withheld consent, AAR filed its motion and brief on March 18, 1985. Rule 36.3 provides the motion must be filed within the time limits of 36.1. That Rule states the motion must be filed within the time allowed for the filing of the motion to dismiss or affirm or the brief in opposition to the Petition for Certiorari. Respondents' brief in opposition to the Petition for Certiorari was filed March 15, 1985. Consequently, AAR's motion is out of time.

AAR's motion further fails to comply with the requirement of Rule 36.3 by not concisely stating the facts or questions of law which have not been, or the reasons for believing that they will not adequately be, presented by the parties to the proceeding. AAR's motion is devoid of those substantive allegations. Respondents believe the reason is obvious. Petitioner is a giant corporation which has sufficient financial resources and competent counsel for setting forth all arguments.

AAR only submits it will assist the Court in resolving the case by providing information the parties cannot provide on what the decision below means in terms of current events and future developments in the railroad industry. This argument completely overlooks the fact that in the underlying case, the BN motor carrier subsidiary was limited to providing motor carrier service which was "ancillary and supplemental to rail service". As cited in Respondents' brief in opposition to the Petition, this historic need for such a restriction no longer exists. In other words, there is now no impediment to a railroad obtaining unrestricted motor carrier rights. The I.C.C. has already

ruled on the issue of employee protective conditions for motor carrier employees involved in a rail acquisition since the *Cosby* decision of the Eighth Circuit.[1] In that case the motor carrier subsidiary was not restricted to ancillary and supplemental service and the I.C.C. distinguished that case from the subject case on that ground. In Respondents' view, AAR's allegation of impending devastation to the rail industry is unfounded. The pertinent portions of the I.C.C. Decision in that case are attached hereto as Appendix 1. A review of that Decision by the I.C.C. clearly indicates that the dramatic effect of the Eighth Circuit Order in *Cosby* as alleged by AAR is farfetched.

CONCLUSION

For the reasons stated above, Respondents respectfully object to the Motion of the Association of American Railroads.

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March 28, 1985

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1. *Chicago, Milwaukee, St. Paul and Pacific Railroad-Reorganization-Acquisition by Grand Trunk Corporation*, Finance Docket No. 28640 (Sub-No. 9).

APPENDIX

APPENDIX 1

[Service Date January 11, 1985]

THIS DECISION WILL BE INCLUDED IN THE BOUND VOLUMES OF THE ICC PRINTED REPORTS INTERSTATE COMMERCE COMMISSION

Finance Docket No. 28640 (Sub-No. 9)[1]

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY-REORGANIZATION-ACQUISITION BY GRAND TRUNK CORPORATION

OPEN CONFERENCE VOTING DATE: DECEMBER 20, 1984

Decided: January 8, 1985

1. In Finance Docket No. 28640 (Sub-No. 9), the Trustee's Amended Plan of Reorganization for MILW[2] approved in the Commission's decision served September 26, 1984 is not modified at this time. However, in the event of the court's approval of the CNW proposal, further approval of the modification by this agency will not be required.

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1. This decision embraces the proceedings listed in Appendix B of the September 26th decision. Also embraced are Finance Docket No. 28640 (Sub-No. 9CC), *Chicago and North Western Transportation Company and Mid-American Rail Properties, Inc. - Exemption - Securities* and Finance Docket No. 30479, *Chicago and North Western Transportation Company - Bonds and Exemption from Competitive Bidding.*

2. See Appendix A of the September 26th decision for abbreviations.

2. In Finance Docket No. 28640 (Sub-Nos. 9C and Q), CNW's and MARP's modified acquisition proposal is approved subject to conditions.

3. In Finance Docket No. 28640 (Sub-No. 9D), CNW's exemption request to acquire stock control and lease and operate lines acquired by MARP is approved.

4. In No. MC-F-15231 (Sub-No. 1) CNW's and MARP's exemption request to acquire control of MMT is approved.

5. In Finance Docket No. 28640 (Sub-No. 9E), CNW and MARP's exemption request to construct and operate a rail line between Seymour and Allertown, IA, is approved.

6. In Finance Docket No. 28640 (Sub-Nos. 9S and CC), CNW and MARP's exemption request for issuance of securities and assumption of obligations is approved.

7. In Finance Docket No. 28640 (Sub-No. 9L), jurisdiction is reserved on GBW's request for trackage rights in response to CNW's modified proposal. GBW's request for conditions in response to Soo's conditions is denied.

8. In Finance Docket No. 28640 (Sub-No. 9V): (a) Soo is granted trackage rights: (1) on CNW's Spine Line between Kansas City, MO and Northfield, MN; (2) between Appleton and Green Bay, WI; and (3) in the vicinity of Milwaukee, WI; and (b) jurisdiction is reserved to impose trackage rights between Sheldon and Muscatine, IA. The remaining conditions sought by Soo to CNW's modified proposal are denied.

9. In Finance Docket No. 28640 (Sub-No. 9W), the trackage rights sought by GTC, DWP, and GTW to the CNW's modified proposal are denied.

* * *

[-16-]* jurisdiction over negotiated agreements to assure that they conform with proper standards.[23]

2. *MMT employees.* The employees of MMT request that we impose protective conditions for their benefit similar to those imposed for employees of rail carriers under 49 U.S.C. 11347. Although employees of rail carriers are entitled to protection under the statute, the imposition of protective conditions for motor carrier employees is a matter solely within our discretion. 49 U.S.C. 11344. Historically, the treatment of these employees has been dissimilar. *American Buslines, Inc. v. United States,* 253 F. Supp. 481 (D. D.C. 1966), *aff'd per curiam,* 385 U.S. 38 (1966), recognized that motor carrier employees do not need the same degree of protection as rail employees. The court noted that the skills of motor carrier employees are more adaptable than those of railroad employees, and that the area of available employment is greater in the motor carrier industry than in the railroad industry. This situation remains the same today.

Notwithstanding this, the MMT employees cite *Cosby v. ICC, supra,* where the court held that the protective provisions of 49 U.S.C. 11347 applied to the employees of a motor carrier. There, the motor carrier was dissolved when its rail parent was merged into another railroad that had its own motor carrier subsidiary. In our opinion *Cosby* is factually inapposite and in dicta it misinterprets the applicable law.

The Interstate Commerce Act was recodified on October 17, 1978. Pub. L. No. 95-473, 92 Stat. 1337. Section

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*Printer's Note: Page numbers in brackets represent original pages of Decision.

23. We note that Soo also entered similar agreements with some of MILW's unions.

5(2)(f) was recodified as 49 U.S.C. 11347, and section 5(2)(b) was recodified as 49 U.S.C. 11344(b). In *Cosby*, the court stressed that, in recodifying section 5(2)(b), Congress changed "rail carrier employees" to "carrier employees" [49 U.S.C. 11344(b)(1)(D)], and, therefore, found that protection of all employees was required. This reading of the recodification totally and inaccurately ignores section 3 of the recodification, which states that "Sections 1 and 2 of this Act restate, without *substantive change*, laws enacted before May 16, 1978 . . . ." (emphasis added), section 3(a) of Pub. L. No. 95-473, 92 Stat. 1466. Hence, no substantive change in the statute was made that requires us to protect motor employees and as we held in our September 26th decision, it remains in our discretion to grant or deny protection to the employees of motor carrier subsidiaries. Indeed, the Eighth Circuit's statutory analysis appears to be only dicta because the court places primary reliance on the factual circumstances that in the court's view make it an abuse of discretion for the Commission to deny labor protection to the motor carrier employees in that case. We now turn to the equitable arguments raised by MMT's employees in urging us to exercise our discretion to protect them.

In *Cosby*, the St. Louis-San Francisco Railway Company (Frisco) was merged into BN.[24] Both railroads owned a motor carrier subsidiary with operating rights restricted to auxiliary-to-rail service. After the rail merger, BN expanded the operations of its subsidiary and dissolved the Frisco subsidiary, Frisco Transportation Company (FTC). The court held that, since the FTC's operations were, in fact, auxiliary to and supplemental

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24. *See Burlington Northern, Inc. - Control & Merger - St. L.*, 360 I.C.C. 784 (1980).

of the Frisco rail operations, the motor carrier was a part of the rail carrier's single transportation system. Further, it held that, since the FTC's operations were intimately tied to the railroad's main transportation function, the employees were [-17-] considered railroad employees and were entitled to the protection accorded by 49 U.S.C. 11347. The court distinguished *American Buslines* and similar cases on the grounds that those decisions did not involve motor carrier subsidiaries of railroads that exclusively operated auxiliary-to-rail services.

Here, the operating authority of MMT is not completely restricted to auxiliary-to-rail service, nor are its operations exclusively auxiliary to or supplemental of MILW. Although a substantial portion of its revenues are attributable to MILW's business, it conducts significant non-rail related transportation operations throughout other States. Thus, MMT cannot be considered a part of the MILW's single transportation system in the same manner as FTC was considered a part of the Frisco's system. Moreover, the fact that MMT employees do provide nonrail related motor transportation indicates that their skills are generally transferable to the general motor carrier industry, a point not evident in *Cosby*. See *Cosby v. ICC, supra,* 741 F.2d at 1081. There are certain areas where there is a coordination of effort between MILW's and MMT's personnel; however, these are primarily nontransportation functions, and such efficiencies of operation in administrative matters do not render MMT an integral part of the MILW's rail transportation system.

Until now, there has been no indication that MMT employees were ever considered to be railroad employees. During the reorganization, the Trustee required railroad employees to participate in a wage reduction program.

The MMT's employees, however, were not required to bear that burden of the railroad's reorganization. The MMT's employees were treated differently from MILW's railroad employees.

Moreover, in *Cosby,* the court was particularly concerned about the equities of the situation. During the BN-Frisco proceedings before this Commission, the senior management indicated that protection would be afforded any employees affected by the merger. The court considered that those promises may have influenced the FTC's employees not to participate in the proceedings and seek protection. Therefore, it concluded that FTC's employees were entitled to the protection of the statute.

In this proceeding, no such promises have been made. Indeed, they appear unnecessary, since MILW's prospective purchasers indicate that the operations of MMT will not be modified. We find nothing in the record to indicate that this is not so.

Since the facts of this case are distinguishable from *Cosby* and the MMT employees have not demonstrated a need for the imposition of conditions for their protection, their request is denied.

3. *UTU Local 528 conditions.* UTU Local 528 requests conditions that would ultimately benefit CNW's and MILW's employees.

The first condition would require CNW to acquire MILW's property used in commuter operations and obligate CNW to perform certain operations in connection with commuter service. This condition would benefit carrier employees on lines used for commuter service. We rejected a similiar condition on page 58 of the September 26th decision as being unnecessary. CNW's asset purchase

agreement provides it would acquire the property used for commuter operation; CNW also agreed to assume MILW's operating responsibilities. We deny this condition as superfluous. Moreover, whether RTA should continue providing the commuter service or CNW should undertake the service is a matter of private agreement between RTA and MILW and its successor particularly where the instant consolidation has nothing to do with the RTA's undertaking of the commuter operation.

* * *

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No. 84-1313

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

RONALD L. COSBY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY OF ASSOCIATION OF AMERICAN RAILROADS TO OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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REPLY OF ASSOCIATION OF AMERICAN RAILROADS TO OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

On March 18, 1985, the Association of American Railroads ("AAR") filed a Motion for Leave to File a Brief *Amicus Curiae* in support of the petition for a writ of certiorari in this proceeding. Respondents withheld consent to the filing of AAR's *amicus* brief, and have filed a document entitled Objection to Motion for Leave to File a Brief Amicus Curiae.[1] The arguments raised by respondents in that document are without merit.

Respondents assert that a brief *amicus curiae* supporting a petition for a writ of certiorari, and a motion for leave to file such a brief, must be filed *before* the filing of the brief opposing the petition. *See* Objection

[1] Respondents originally attempted to file their Objection in typewritten form. The Clerk of the Court noted receipt on March 28, 1985, and returned the papers for re-submission in printed form. *See* Letter from Alexander L. Stevas to Alex M. Lewandowski (March 28, 1985). The Clerk stated that the printed copies could be back-dated to March 28, 1985. *Id.* AAR received the printed version of the Objection on April 10, 1985.

to Motion for Leave to File a Brief Amicus Curiae at 2. This is plainly incorrect. Rule 36.1 of the Rules of the Supreme Court of the United States requires that a brief *amicus curiae*, and a motion for leave to file such a brief, must be filed "within the time allowed for the filing of . . . the brief in opposition to the petition for certiorari." The petition for a writ of certiorari in this matter was filed on February 15, 1985. Under Rule 22, the opposition to the petition was due thirty days later, on March 18, 1985.[2] Indeed, the cover of respondents' brief in opposition to the petition acknowledges this timetable with the following notation: "Due Date: March 18, 1985."

AAR filed and served its brief *amicus curiae* and motion on the day that briefs in opposition were due: March 18, 1985. The brief and motion were thereby timely filed under Rule 36.1. Respondents' mailing of their own brief three days early, on March 15, 1985, did not affect the timeliness of AAR's filing.

Respondents also assert that leave to file should be denied because AAR will not address points of law or factual arguments not already adequately presented by the parties, citing Rule 36.3. That rule, however, applies only to the filing of briefs *amicus curiae* "in a case before the Court for oral argument," not to briefs filed when the Court is still considering the petition for a writ of certiorari. Supreme Court Rule 36.3. Thus, the arguments made by respondents based on their reading of Rule 36.3 are inapplicable to this case in its current posture.

Indeed, it would be illogical to apply the provisions of Rule 36.3 to briefs *amicus curiae* filed pursuant to Rule 36.1, because petitions for certiorari (and oppositions)

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[2] The thirtieth day after February 15, 1985, was March 17, 1985. Because March 17 was a Sunday, however, the last day for the filing of the opposition became March 18, 1985. Supreme Court Rule 29.1.

are designed to stress why review should be granted rather than to analyze thoroughly the merits. *See* R. Stern & E. Gressman, Supreme Court Practice 497 (5th ed. 1978). While an *amicus* at the certiorari petition stage cannot anticipate the parties' treatment of the merits, it can call to the Court's attention the significance of a decision for which review is sought. That is what AAR seeks to do in this case.

AAR is uniquely qualified to comment on the potential impact of the decision below on industry-wide trends and conditions. As AAR stated in its motion, it has been actively involved in the interpretation of the railroad employee labor protection statute for nearly fifty years. AAR and various of its members are currently participating in judicial, administrative and legislative proceedings involving railroads and motor carriers that are potentially affected by the decision below. Those proceedings will substantially influence the structure of the evolving surface transportation industry for years to come. AAR submitted its brief *amicus curiae* in the belief that the information presented, developed from AAR's experience and broad perspective in the labor protection area, would be useful to the Court in evaluating the petition.

AAR respectfully requests that its motion for leave to file its brief *amicus curiae* be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
PETITIONER

v.

RONALD L. COSBY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals erred in concluding that under the circumstances of this case certain employees of a railroad's motor carrier subsidiary were entitled to labor protection benefits when they were laid off following a railroad merger.

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 741 F.2d 1077. The decision of the Interstate Commerce Commission (Pet. App. 15a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on August 22, 1984. A petition for rehearing was denied on October 18, 1984 (Pet. App. 23a). On December 20, 1984, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including February 15, 1985, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the court of appeals' decision that employees of a railroad's motor carrier subsidiary are entitled to the employee protection guarantees of railroad employees.

1. This case involves approximately 110 employees of Frisco Transportation Company (FTC), a motor carrier subsidiary of the St. Louis-San Francisco Railway Company (Frisco). In 1980, the Interstate Commerce Commission gave its approval to the merger of Frisco into the Burlington Northern Railroad Company (BN). Under Section 11347 of the Interstate Commerce Act (49 U.S.C.),[1] the Commission is required to provide a substantial level of protection, known as the "*New York Dock* conditions,"[2] to affected railroad employees when a rail carrier is involved in a transaction requiring Commission approval. The Commission has on occasion provided some limited protection for motor carrier employees affected by a motor carrier merger or consolidation, pursuant to its general authority to impose conditions in connection with a merger or consolidation (49 U.S.C. 11344(c)).[3] In the case of Frisco's merger into BN, the Commission imposed the "*New York Dock*

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[1]See Pet. App. 28a.

[2]The protective conditions were described in *New York Dock Ry. -Control - Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), aff'd, 609 F.2d 83 (1979). These conditions were fashioned by the Commission to implement a 1976 congressional directive that railroad employee protective conditions be "no less protective of the interests of employees than those heretofore imposed." Pub. L. No. 94-210, § 402(a) 90 Stat. 62. The protections are substantial — displaced employees receive full pay and fringe benefits for six years (see Pet. App. 29a, 32a-35a).

[3]See Pet. App. 27a-28a.

conditions" for "railroad employees of the merged system and subsidiaries" in connection with the merger.[4]

Prior to the merger, BN had represented that there would be no change in FTC's operations. Following the merger, however, FTC experienced substantial losses and BN decided to close down FTC and lay off its employees. BN maintained that FTC employees were not covered by the employee protective conditions imposed in the merger because they were motor carrier employees rather than "railroad employees." In January 1983, FTC employees petitioned the Commission to require BN to comply with the protective conditions.

2. The Commission denied the FTC employees' request to enforce the protective conditions. It held that the protection imposed was intended to be limited to those employees traditionally protected by Section 11347 — employees of railroads, and not employees of non-rail subsidiaries (Pet. App. 17a). The protective condition itself was specifically limited to "railroad employees," the Commission noted (*ibid.*). It stated that it had not intended to exercise its discretionary power under Section 11344(c) in order to extend *New York Dock* protection to motor carrier employees affected by the merger (Pet. App. 17a-18a).

The Commission went on to consider whether it should issue a supplemental order, a power exercised in extraordinary cases where a party has failed to comply with representations made during merger proceedings. After reviewing the record, the Commission found no misrepresentation by BN of its intentions regarding FTC, and adopted BN's argument that the FTC layoffs resulted from unforeseen

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[4] "*Burlington Northern, Inc. - Control & Merger - Saint Louis, S.F. Ry.*, 360 I.C.C. 788, 1182 (1980). These railroad employees were "entitled to the standard level of protection" (360 I.C.C. at 1182), *i.e.*, the level specified in *New York Dock*.

changes in business circumstances occurring after the merger. Accordingly, the Commission held that there was no warrant for imposing new obligations on BN.

3. The court of appeals reversed, holding that FTC's employees were entitled to the *New York Dock* protections. It gave alternative grounds for its decision.

The court first concluded that the FTC employees were entitled to the protection of the *New York Dock* conditions because they were "railroad employees" within the meaning of the Interstate Commerce Act (Pet. App. 2a-7a). The court distinguished the cases relied upon by the Commission on the ground that the motor carriage performed by FTC was limited to transportation which was auxiliary to rail movements and thus, in the court's eyes, "intimately tied to the railroad's main transportation system" (Pet. App. 6a-7a). This "auxiliary-to-rail" limitation on FTC's activities convinced the court that FTC differed from other non-rail subsidiaries of railroads and from other motor carriers, transforming FTC's employees into "railroad employees." The court also concluded that the FTC employees were "affected" by the merger since, if "FTC has not been made a subsidiary of BN as a result of the merger, BN could not have phased out FTC" (Pet. App. 3a-4a).

The court then "alternatively" (Pet. App. 14a) adopted the Commission's position that protection of these motor carrier employees was discretionary, but reached the same conclusion as to the appropriate protection in this case. The court held that, "under the facts and circumstances of this case, it was an abuse of discretion not to grant the FTC employees the same protective conditions granted to Frisco's other railroad employees" (Pet. App. 7a-8a). The court based this conclusion on a document filed by BN (Pet. App. 11a-12a) and testimony by an officer of BN's motor carrier subsidiary (Pet. App. 13a) representing that there would be

no change in the operation of FTC following the merger. It also pointed to several statements by BN and Frisco management officials, which did not refer specifically to FTC employees, to the effect that employees would be protected from the effects of the merger (Pet. App. 8a-11a). Concluding that the FTC employees "had the right to rely" on these representations (Pet. App. 14a), the court ruled that the Commission abused its discretion in failing to provide *New York Dock* protection for FTC's employees.

Following the court of appeals' decision, the Commission reopened proceedings and, in accord with the Eighth Circuit's mandate, imposed "employee protective conditions at the level authorized in *New York Dock* * * * for the benefit of the former employees" of FTC (Pet. App. 24a).[5]

ARGUMENT

The federal respondents disagree with the court of appeals' conclusions. Nevertheless, we do not support the petition for certiorari because, in our view, further review of this proceeding is not warranted. The effect of the court's ruling is limited to 110 displaced employees since the issues presented in this case are unlikely to recur. The Commission can fulfill its responsibilities without hindrance under the court of appeals' second alternative ruling. Accordingly, despite the court's erroneous conclusions, this case does not merit plenary consideration by the Court.

1. The court of appeals' determination that the employees of a railroad's motor carrier subsidiary are "railroad employees" entitled to mandatory employee protection contravenes 40 years of Commission precedent. During

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[5]The Commission declined to determine individual benefits, referring that issue to the parties, or, if negotiations fail, to arbitration, as required by the *New York Dock* conditions (Pet. App. 24a).

should be classified as railroad employees or motor carrier employees. In December 1982, the Commission adopted a policy statement informing the public that it would no longer routinely impose the auxiliary-to-rail restriction on motor carrier subsidiaries of railroads. *Applications for Motor Carrier Operating Authority by Railroads & Rail Affiliates*, 132 M.C.C. 978, 989 (1982), aff'd *sub nom. American Trucking Ass'ns Inc.* v. *ICC*, 722 F.2d 1243 (5th Cir.), cert. denied, No. 83-2117 (Oct. 29, 1984). Consequently, motor carrier subsidiaries of railroads have been acquiring unrestricted operating authority. Since employees of a motor carrier with unrestricted operating authority would not be "railroad employees" under the court's first alternative ground, the significance of that decision is diminished by the Commission's recent policy statement.

In short, the court of appeals' ruling, while wrongly decided on the merits, is not likely to have a significant adverse effect on the Commission's administration of the Interstate Commerce Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Penn-Central Merger & N&W Inclusion Cases, 389 U.S. 486 (1968) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1313

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

RONALD L. COSBY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

The Petition demonstrated that the decision below is contrary to forty-five years of administrative interpretation and the clear legislative history of section 5(2)(f), *see* Petition for Writ of Certiorari at 8-14. Without even attempting to challenge this showing, respondents seek to evade further review by asserting that the decision below is limited to its facts. That assertion is belied, however, by (1) the numerous claims already advanced by motor carrier employees on the basis of the Eighth Circuit's decision, (2) the dramatic demonstration of the industry-wide impact of the decision below made by the Association of American Railroads in its brief *amicus curiae*, and (3) the contrary claims of respondents' own counsel in ongoing administrative proceedings.

ARGUMENT

I

The Petition shows that the court of appeals' holding contradicts the Commission's longstanding, consistent interpretation that employees of a non-railroad subsidiary are not "railroad employees." [1] In their Opposition, respondents do not even attempt to dispute the thrust of the Petition, nor do they make an effect to justify the lower court's disregard of established precedent.[2] Respondents also make no effort to show how the unique economic circumstances that gave rise to section 5(2)(f) of the Interstate Commerce Act have any application to motor carrier employees in the 1980's.[3]

Instead of addressing petitioner's position, respondents merely allege that the decision below is limited to its facts. On the contrary, the substantial impact of the Eighth Circuit's decision is described in detail by the Association of American Railroads in its brief *amicus curiae*.[4] Respondents' claims as to the limited scope of the decision cannot be reconciled with the positions taken by motor

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[1] *See* Petition for Writ of Certiorari at 8-14.

[2] Respondents incorrectly assert that the Commission precedent cited by petitioner did not develop in the context of railroad proceedings. In fact, railroads were parties in the Commission's initial decision denying mandatory labor protection to employees of a non-railroad subsidiary, *Baltimore Steam Packet Co. Acquisition, Control, Etc.*, 244 I.C.C. 583 (1941) (Atlantic Coast Line Railroad; Seaboard Air Line Railway; Southern Railway), as well as other ICC decisions. *See also Trailways of New England, Inc.—Purchase—Boston & Maine Transportation Co.*, 80 M.C.C. 697 (1959) (Boston & Maine Railroad).

[3] *See* Petition for Writ of Certiorari at 10-12; Brief *Amicus Curiae* of Association of American Railroads in Support of the Petition at 5-12 [hereinafter cited as AAR Brief].

[4] AAR Brief at 12-19. While petitioner consented to the filing of this brief, respondents withheld consent. A motion for leave to file the *amicus* brief is currently pending.

carrier unions who have argued for broad application of the Eighth Circuit's ruling on pending proceedings before the Commission.[5] In fact, counsel for respondents in this case has argued that under the Eighth Circuit's ruling "employees of a wholly-owned motor carrier subsidiary which is controlled and 'intimately tied' to the . . . rail operation" are entitled to mandatory labor protection, even though the motor carrier subsidiary is not restricted to auxiliary to rail service.[6] The fact that motor carrier unions are relying on a broad reading of the decision below to demand the benefits of *New York Dock* in a variety of factual contexts demonstrates that the Eighth Circuit's decision is not limited as the government and respondents suggest.

The government confirms that the Eighth Circuit's interpretation of section 5(2)(f) is clearly wrong, but suggests that the case does not warrant plenary review because "it is not likely to have a significant adverse effect on the Commission's administration of the Interstate Commerce Act." Brief at 8. The government, however, fails to recognize that more is at stake than its own "administration" of a statute. The decision below has already created substantial uncertainty affecting pending and future mergers. Moreover, the possibility of litigation over the large amounts of money involved in mandatory, six-year labor protection has introduced new complexities into labor negotiations in the transportation industry. This case presents the proper vehicle for this Court to resolve the confusion regarding the reach of section 5(2)(f) and to prevent the unnecessary litigation of this issue before

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[5] *See* Petition for Writ of Certiorari at 15.

[6] Position Paper of Seventy (70) Individual Employees of Milwaukee Motor Transportation Co. Seeking Employee Protective Conditions, *Chicago, Milwaukee, St. Paul & Pacific Railroad—Reorganization—Acquisition by Grand Trunk Corp.*, Finance Docket No. 28640 (Sub-No. 9) (I.C.C. filed Aug. 5, 1982).

the Commission and the courts.[7] Given the dynamic character of the present transportation industry, *see* AAR Brief at 18-19, prompt resolution of this important issue is required.

II

The Petition demonstrated that the court of appeals exceeded its jurisdiction in determining whether the claimants' dismissals were the result of the BN-Frisco merger.[8] The Petition also showed that the court below exceeded its jurisdiction and usurped an administrative function when it ordered the Commission to grant specific relief. Once again respondents avoid the substance of the Petition and place primary reliance on the argument that petitioner failed to raise these issues adequately in the court below.

Contrary to respondents' assertion, petitioner raised both these issues at the first time it could raise them—in its Petition for Rehearing before the Eighth Circuit. This proceeding began with respondents' request that the Commission reopen the merger proceeding and "make appro-

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[7] Respondents' suggestion that the Court review this issue at a later date in a different case is disingenuous. As this Court is well aware, merger proceedings involve extensive records, raise multiple issues and can take years to wend their way through the Commission and the courts. *See, e.g., Penn-Central Merger & N&W Inclusion Cases*, 389 U.S. 486, 494 (1968) (merger under consideration for 10 years). In the interim, the Eighth Circuit's ruling could inhibit other consolidation proceedings and complicate and distort those proceedings that do occur. This relatively simple and straightforward case presents the ideal vehicle for the Court to resolve this issue.

[8] Under *New York Dock*, resort to arbitration was clearly required. *See Allis-Chalmers Corp. v. Lueck*, 53 U.S.L.W. 4463 n.1 (U.S. April 16, 1985) ("The use of the permissive 'may' is not sufficient to overcome the presumption that parties are not free to avoid . . . arbitration procedures.").

priate orders for BN to comply with the employee protective provisions [of New York Dock]." [9] When the Commission refused to reopen the earlier proceeding at all, respondents appealed to the Eighth Circuit; the only issue before the court of appeals was whether the Commission abused its discretion by not reopening the underlying merger proceeding. The panel, however, not only determined whether the proceeding should be reopened, but also went on to decide the two questions disputed here. The panel purported to decide the factual issue of causation—usurping the function of the arbitration committee contemplated by *New York Dock*—and ordered the Commission to impose specific relief—usurping the administrative function of the Commission.

In its Petition for Rehearing before the Eighth Circuit, Burlington Northern stressed that the only issue properly before the Court of Appeals was whether the Commission should have reopened the merger proceeding and that "[i]f the agency abused its discretion by not reopening, the remand should *only* require reopening." [10] Petitioner argued that the Commission, not the court, was the proper authority to determine what, if any, labor protection should be imposed because "[i]t is the ICC's exclusive jurisdiction under section 11347 to fashion and prescribe protection based on its own factual determinations." [11] On remand, the Commission's decision on the type of labor protection to impose would in turn determine whether causation issues would go to an arbitration committee as

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[9] Petition to Re-open, Request for Compliance of Commission Order, Evidence & Argument in Support thereof at 15.

[10] Intervenor Burlington Northern Railroad Company's Petition for Rehearing and Suggestion for Rehearing *En Banc* at 11 (emphasis in original).

[11] *Id.* at 12.

mandated by *New York Dock* conditions, or be decided in some other forum. Thus the lower court's prescription of relief and circumvention of arbitration are clearly issues capable of review by this Court.[12]

As to causation, respondents do not attempt to dispute that the court was without jurisdiction to decide this issue. As to the relief issue, respondents assert that the Eighth Circuit simply determined that "under this case of first impression, the Respondents were railroad employees" entitled to receive the benefits of the *New York Dock* conditions. Opp. at 15.[13] The assertion that this is a case of first impression ignores the fact that the level of benefits imposed under section 5(2)(c) is a settled administrative question and that the Commission has never required more than three months' severance pay for motor carrier employees pursuant to that section.[14] But even assuming a question of first impression were involved, that would provide more—not less—reason to obtain the views of the Commission as to the scope of the

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[12] *Berkemer v. McCarty*, 104 S. Ct. 3138, 3148 n.23 (1984); *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); *Carlson v. Green*, 446 U.S. 14 (1980).

[13] The petition demonstrated that the court of appeals could not order relief under § 5(2)(c) because this section requires an exercise of discretion by the Commission. The only justification proffered by respondents for the court's § 5(2)(c) ruling is reliance on the court's first holding that respondents were "railroad employees." Opp. at 15. To the extent that respondents are utilizing the court's first holding to support its ordering of relief under § 5(2)(c), they are admitting that no independent basis exists for the latter ruling. Respondents' own argument demonstrates that the court's alternative holding under the discretionary provision of § 5(2)(c) cannot stand as a proper independent basis for the decision.

[14] *See* Petition for Writ of Certiorari at 13.

benefits to be granted. *See NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 (1974).[13]

CONCLUSION

This case is distinguished by an unusual fact: none of the four briefs submitted to the Court in this case purports to defend the Eighth Circuit's unprecedented construction of section 5(2)(f) on the basis of the prior decisions of the Commission, the legislative history, or economic rationale of the statute. The only dispute here is over the impact of the Eighth Circuit's error. Petitioner submits that the decision below warrants plenary review by this Court in order to insure that it does not continue to have a chilling effect on merger proceedings and labor negotiations at this critical time in the surface transportation industry. At a minimum, the Eighth Circuit's patently erroneous decision should be summarily reversed in order to reinstate the Commission's longstanding rule that *New York Dock* conditions do not apply to the employees of non-railroad subsidiaries.

Respectfully submitted,

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[13] *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967), cited by respondents, is inapposite. The issue in *Neely* was whether a court of appeals, after holding that the evidence at trial was insufficient, could order a district court to dismiss an action.